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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the interpretative rule exception from the notice and comment procedures of the Administrative Procedure Act and the Clean Air Act to uphold a regulation that implements an agency's substantive policy determinations and has a substantial impact on regulated parties?

2. In reviewing a regulation treated as "interpretative," did the Court of Appeals err by applying the highly deferential standard of review for legislative regulations this Court enunciated in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984)?

3. Did the Court of Appeals err in sustaining an EPA regulation extending motor vehicle manufacturers' emissions recall liability beyond the statutorily prescribed 5 year/50,000 mile "useful life" to include all vehicles regardless of age or mileage?

PARTIES TO THE PROCEEDINGS

Petitioner General Motors Corporation was the petitioner in the Court of Appeals. Respondent Lee M. Thomas is the Acting Administrator of the U.S. Environmental Protection Agency, which issued the rule and final determination reviewed by the Court of Appeals. There are no other parties to this case.

Pursuant to Supreme Court Rule 28.1, GM's non-wholly owned subsidiaries and affiliates are:

Aralmex, S.A. de C.V. (Mexico)
Automotriz Gencor S.A. (Ecuador)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Motor Co., Ltd. (Korea)
DHB—Componentes Automotivos S.A. (Brazil)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Colombia S.A. (Columbia)
General Motors Egypt, S.A.E. (Egypt)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corp. (USA)
Industries Mecaniques Maghrebires, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Moto Diesel Mexicana, S.A. de C.V. (Mexico)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

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IN THE

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OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,
v.
LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, General Motors Corporation, respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the District of Columbia Circuit entered on September 7, 1984.

OPINIONS BELOW

The opinions of the Court of Appeals issued after rehearing *en banc* are published at 742 F.2d 1561 and are reprinted in the Appendix as App. A. The panel opinions of the Court of Appeals are published at 724 F.2d 979 and are reprinted as App. B. The Court of Appeals' rehearing orders and judgment are included as App. C and App. D, respectively. The "Interpretive Rule" promulgated by respondent and its June 23, 1980 final action are reprinted as App. E and App. F, respectively.

JURISDICTION

The judgment of the Court of Appeals *en banc* was entered on September 7, 1984. The Chief Justice on November 29, 1984 extended the time for filing this petition to and including January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTES INVOLVED

The statutes and regulations involved are the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, the Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq.*, and regulations adopted thereunder, 40 C.F.R. Part 85.

The principal provision of the Clean Air Act at issue here is § 207(c)(1),[1] which provides in pertinent part:

> "If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, *do not conform to the regulations prescribed under section 202, when in actual use throughout their useful life (as determined under section 202(d))*, he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer." (Emphasis added.)

"Useful life" is defined in § 202(d)(1) as five years or fifty thousand miles, whichever occurs first. The challenged EPA regulation provides that manufacturers must remedy all "vehicles which experienced the nonconformity during their

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[1] For the Court's convenience, citations throughout are to the sections of the Clean Air Act. Parallel citations to the U.S. Code are provided in the Table of Authorities.

useful lives *regardless of their age or mileage* at the time of repair." 40 C.F.R. § 85.1803 Appendix A (emphasis added). Other materials pertinent to the legislative history are reprinted in App. G, and to the history of the challenged regulation in App. H.

STATEMENT OF THE CASE

This is a case of first impression regarding EPA's power to expand the scope of vehicle manufacturers' emissions recall liability under the Clean Air Act. The petition squarely presents two issues of major significance in administrative law, each of which merits plenary consideration by this Court. *First*, the petition asks this Court to articulate a test which federal courts can apply consistently to distinguish between legislative and interpretative rules. *Second*, the petition establishes the need for this Court to clarify that the highly deferential standard of review for policy-based regulations articulated in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984), does not extend to interpretative rules adopted without notice and comment rulemaking.

Statutory Background. By amendments enacted in 1970, the Clean Air Act requires that all passenger motor vehicles sold in the United States be designed, built and warranted to comply with emissions standards during their useful lives. "Useful life," in turn, is defined in § 202(d)(1) as 5 years or 50,000 miles, whichever sooner occurs. The 5 year/50,000 mile useful life period was chosen purposefully by Congress to establish a reasonable limit on vehicle manufacturers' obligations to ensure compliance with the emissions standards:

> "The manufacturers informed the Committee that they would not be able to guarantee conformity with emissions standards for the anticipated 10-year life of a vehicle. The committee bill provides that 50,000 miles would be the *maximum that a vehicle would be required to conform to the standards* for which it was certified." S. Rep. No. 1196, 91st Cong., 2d Sess. 30 (1970), *reprinted in* 1 1970

Legislative History of the Clean Air Act at 430 (emphasis added). App. G-27.

In keeping with this legislative judgment, Congress directed that a manufacturer's liability under the Clean Air Act's overlapping compliance scheme, including new model certification (§ 206(a)), assembly line testing (§ 206(b)) and defect warranty (§ 207(a)), terminates once a vehicle has attained 5 years or 50,000 miles of service.[2] The same legislative judgment is reflected in § 207(c)(1), which empowers EPA, when it determines that a substantial number of a vehicle class do not conform with applicable emissions standards during their 5 year/50,000 mile useful lives, to order a manufacturer to submit a plan for remedying the nonconformity of such vehicles at the manufacturer's expense.

The "Interpretive Rule" and the Agency's Order. On May 22, 1980, without notice and comment, EPA adopted a "nationally applicable regulation" to become effective on May 30, 1980. 45 Fed. Reg. 36396. This regulation amended 40 C.F.R. § 85.1803[3] by adding an "interpretive ruling" which, in language that is imperative, not interpretative, requires that each remedial plan:

> "provide that the manufacturer will remedy, at the manufacturer's expense, all properly maintained and used vehicles which experienced the nonconformity during their

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[2] The 1970 amendments also limited the performance warranty of emissions control components to 5 years or 50,000 miles. That warranty period continues for "sole or primary purpose" components, but was reduced for other components to 2 years or 24,000 miles by the Clean Air Act Amendments of 1977. Section 207(b).

[3] In 1974, after notice and opportunity for comment, EPA promulgated the initial regulations governing recalls. 40 C.F.R. Part 85. Section 85.1803 sets forth the required contents of recall remedial plans, including recall methodology, description of the repair, texts of repair instructions and other such information.

> useful lives *regardless of their age or mileage* at the time of repair." (Emphasis added.)

Prior to the controversy with GM in this case and the unforeseen promulgation of the above regulation, manufacturers had no hint that EPA would negate the 5 year/50,000 mile useful life limitation on recall repair liability.[4]

In March 1977, three years before the regulation was adopted, EPA had ordered GM to recall certain 1975 Cadillacs. Prior to that order, GM had volunteered to recall those cars and in April 1977, submitted a proposed remedial plan voluntarily including additional vehicles. Timely acceptance of GM's plan would have assured the eligibility for repair of all affected vehicles. Nonetheless, EPA initially rejected the GM plan.[5] After 2½ years of protracted negotiations, EPA finally accepted GM's plan in December 1979. By that time, many of the 1975 Cadillacs had exceeded their 5 year or 50,000 mile statutory useful lives. GM's final remedial plan of February 5, 1980 therefore provided that those vehicles which had exceeded their

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[4] The judges below disagreed at length whether EPA's interpretation was "longstanding" before the "need" for an "interpretative" regulation was conceived. *Compare* App. A-8 n.7 (*en banc* majority) *with* App. A-26 nn.11 & 12 (*en banc* dissent). In fact, as the factual "record" compiled by the agency confirms, the issue of the manufacturer's duty to fix cars whose useful lives had ended had been disputed only once, in a recall of certain Chrysler vehicles. *See* App. H-6. The useful life issue was not pressed in that case, however, because the initial determination of nonconformity was the focus of dispute. *Chrysler Corp.* v. *EPA*, 631 F.2d 865 (D.C. Cir.), *cert. denied*, 449 U.S. 1021 (1980).

[5] EPA insisted initially that GM audit the repaired vehicles to monitor the performance of independent dealers of GM vehicles. GM objected that such an audit and the related enforcement sanctions EPA expected GM to undertake exceeded EPA's statutory authority and would inappropriately alter GM's business relationships with its dealers. EPA ultimately withdrew its insistence on the audit and approved GM's remedial plan. *See* Ct. Appeals Joint App. 142, 145-46, 252.

useful lives would not be included because they were no longer subject to the emissions standards.

EPA did not then act on GM's final plan. Instead, to bolster a position its enforcement personnel wanted to take, EPA's staff prepared an internal memorandum "supporting need for interpretive rule on motor vehicle manufacturers' liability for repair of recall vehicles." App. H-1 (May 9, 1980). Based on that memorandum, EPA adopted its new nationally applicable regulation and made it effective upon publication, May 30, 1980. App. E-1. Three weeks later, citing the regulation, EPA ordered GM to recall and repair the 1975 Cadillacs regardless of their age or mileage or else suffer "fines of up to $10,000 per vehicle." App. F-4. On the basis of factual assumptions and policy determinations that were not tested by notice and comment rulemaking, this new regulation effectively reads the 5 year/50,000 mile limit on repair obligations out of § 207(c)(1) of the Act.

The Court of Appeals' Decisions. GM sought review in the D.C. Circuit of EPA's new regulation and its final order. On December 16, 1983, a panel of that Court vacated both. Judge Bazelon held that EPA's interpretation was entitled only to limited deference and was inconsistent with the plain statutory text and legislative history. App. B-1. Judge Wilkey filed a concurring opinion comparing four possible constructions of § 207(c)(1) and identifying the construction he believed the legislative history supported. App. B-43. Judge Wald dissented, agreeing with EPA's interpretation. App. B-47.

On EPA's petition, the court ordered rehearing *en banc*. A divided Court of Appeals thereafter upheld EPA's regulation and order, purporting to follow this Court's intervening decision in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984). Judge Wald, writing for the *en banc* majority, accepted EPA's characterization of the regulation as interpretative and held therefore that notice and comment procedures were not necessary. The court recognized, however, that the regulation was devised to imple-

ment "EPA policy" and "policy choices" and to effectuate selected "policy goals." App. A at 8-11 & n.7, 11-12 & n.8, 13, 17, 20-22. Based on the highly deferential *Chevron* standard of review and the "respect" it believed *Chevron* mandated for those policy determinations, the majority then upheld the regulation as imposing an acceptable requirement having "adequate support" in the statute and its purpose. *Id.* at 11-23 & 11-12 n.8.

REASONS FOR GRANTING THE WRIT

The two administrative law issues presented by this petition govern both the public's opportunity to participate before an agency promulgates regulations and the standard of judicial review to be applied after regulations are adopted. Each of the issues meets the traditional standards for exercise of this Court's jurisdiction and has far-reaching implications, not only for motor vehicle manufacturers, but for all persons subject to administrative regulation.

First, the petition asks this Court to clarify the test for distinguishing between legislative regulations, which can be promulgated only after notice and comment, and interpretative rules, which are exempt from those safeguards. Although the consequences of this distinction have long been critical to the conduct of administrative proceedings and judicial review of agency regulations, this Court has never articulated a test for making the legislative-interpretative distinction. In the absence of guidance from this Court, agencies and lower federal courts have developed their own differing and often conflicting formulations.

Second, the petition asks this Court to resolve a conflict over whether the highly deferential standard of review for policy-based, legislative regulations articulated in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984), should be extended to interpretative rules. The court below held that *Chevron* does govern review of the regulation involved here, which it had classified as inter-

pretative. At least two other circuits, in contrast, have concluded that *Chevron* does not apply to interpretative rules.

While each of these issues independently warrants granting certiorari, the issues are closely intertwined in many respects. Thus, this Court's decision in *Chevron*, especially as applied by the D.C. Circuit, also underscores the need for definitive guidance in distinguishing between legislative and interpretative regulations. In addressing the applicable standard of judicial review, *Chevron* distinguished between instances where Congress has expressed its own intent regarding an issue, leaving to agencies the effectuation of that intent, and cases where Congress "has not directly addressed the precise question." 104 S. Ct. at 2781-82. In the latter case, Congress delegates authority to the agency, either explicitly or implicitly, to resolve questions of implementation based on the agency's accomodation of competing policies and interests. Contrary to the D.C. Circuit's decision *en banc*, only regulations adopted pursuant to such delegated legislative responsibility are entitled to *Chevron*'s particularly deferential standard of review.

At the same time the D.C. Circuit has improperly extended the *Chevron* standard of review to interpretative rules, its approach ignores the lessons of *Chevron* for making the legislative-interpretative distinction. *Chevron*'s focus on whether Congress itself intended to resolve an issue, or instead left the issue for the agency to resolve in policy-based regulations, demonstrates that the EPA regulation involved here should have been treated as legislative, not interpretative. Elements of the tests employed by several other circuits also indicate the regulation is legislative. The consequence of the D.C. Circuit's conflicting approach is that EPA and other agencies will be free to make legislative policy choices without following the notice and comment requirements designed to inform agency decisionmakers. Yet, despite the absence of notice and comment, the D.C. Circuit accords to "interpretative" regulations the same high level of judicial deference that *Chevron* accords only when all procedural safeguards have been observed.

Finally, while the administrative law issues here arise in a case of great importance to GM and the automobile industry, they apply universally to all individuals and businesses affected by agency action. EPA's new regulation, by overriding the statutory useful life limitation, significantly expands the recall repair obligations of automobile manufacturers in a program that involves millions of vehicles per year. If such policy-based regulations going beyond Congress' expressed intent and having such profound impact are to be adopted—whether for the automobile industry, recipients of social security, AFDC or other benefits, or the public at large—the regulations should be recognized as legislative and adopted with the benefit of the public participation contemplated by the Administrative Procedure Act. Not only does that participation provide the information essential to reasoned decisionmaking, it is the very justification for according administrative agencies the authority to resolve such legislative issues in the first place.

I. THE "INTERPRETATIVE RULE" EXCEPTION FROM NOTICE AND COMMENT RULEMAKING SHOULD NOT EXTEND TO AGENCY REGULATIONS THAT REFLECT LEGISLATIVE POLICY JUDGMENTS MADE IN THE EXERCISE OF CONGRESSIONALLY DELEGATED AUTHORITY.

A. This Court's Guidance Is Needed To Reconcile The Conflicting Tests Applied By The Courts Of Appeals To Distinguish Between Interpretative And Legislative Regulations.

The distinction between "interpretative" and "legislative" regulations is fundamental in administrative law and has been part of the Administrative Procedure Act since its enactment. 5 U.S.C. § 553(b)(A). "Legislative" or "substantive" regulations are subject to the notice and comment requirements of the APA, whereas "interpretative" rules are exempt from those procedural safeguards. Notice and comment procedures serve both to inform the agency's decisionmaking and to assure

the integrity of the process by which an agency makes legislative or policy judgments.[6] Once adopted, legislative regulations have the force and effect of law. Interpretative rules, by contrast, have no binding effect and serve only to advise the public of an agency's construction of a statute. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-03 (1979).

It is by legislative regulation that an agency, delegated legislative authority by Congress, implements policy choices. The agency is the final arbiter of those choices, subject only to limited judicial review as directed by Congress. On the other hand, only the judicial branch can make binding decisions on issues properly subject to treatment in interpretative rules, giving varying degrees of deference to the agency's views. *Id.* at 301-03; *Batterton* v. *Francis*, 432 U.S. 416, 425 & n.9 (1977); 2 K. Davis, *Administrative Law Treatise* § 7:13 (2d ed. 1979). Accordingly, the classification of an agency's action as legislative or interpretative significantly affects the procedures for its adoption, its legal effect and the applicable standard of judicial review.

Despite the significant implications of the distinction, this Court never has articulated a test for determining whether an agency rule is interpretative as opposed to legislative.[7] Indeed,

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[6] Specifically, § 4(b)(A) of the APA, incorporated by reference in Clean Air Act § 307(d)(1), exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from notice and comment rulemaking. Although the instant regulation rested heavily on the agency's policy views, it cannot be classified as a "general statement of policy," nor has the agency attempted to invoke that exception. Because of the importance of allowing public participation and developing a sufficient record for agency decisionmaking, these exemptions are to be narrowly construed. *American Transfer & Storage Co.* v. *ICC*, 719 F.2d 1283, 1295 (5th Cir. 1983); *Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981).

[7] The Court's decisions in *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Batterton* v. *Francis*, 432 U.S. 416 (1977); and *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), address the consequences of the distinction, but do not provide a test for making the distinction.

the Court highlighted in *Chrysler* the absence of such a test and pointed out that most of the relevant sources for guidance "essentially offer definitions by negative inference." 441 U.S. at 301-02. Although certiorari was granted to consider this issue in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court ultimately resolved that case on other grounds.[8] The recognized need for this Court's guidance thus remains unmet.

The court below also acknowledged that the present standards for distinguishing between interpretative and legislative rules are "'enshrouded in considerable smog.' "[9] App. A-7 (*en banc* majority). Nevertheless, based on the general principles established in its prior decisions, the Court of Appeals held that EPA's regulation extending the recall remedy was "interpretative" in nature and exempt from notice and comment procedures. First, the court gave considerable weight to EPA's "own label" of the regulation as "interpretative." *Id.* Second, the court concluded that EPA had not "*intend[ed]* to create new law, rights or duties."[10] App. A-8 (emphasis added). Al-

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[8] Specifically, the welfare rights organization presented the question whether a "substantial impact" test should be employed. Brief for Petitioner at 3, 41-47; Brief for Respondent at 3, 97-103. This Court disposed of the case on the ground, raised by the cross-petitioner, that the organization lacked standing to challenge the agency's rule.

[9] A number of commentators have lamented the absence of guidance. *See, e.g.*, M. Asimow, *Public Participation in the Adoption of Interpretative Rules and Policy Statements*, 75 Mich. L. Rev. 520, 523-24, 561 (1977); M. Warren, *The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretative Rules*, 29 Ad. L. Rev. 367, 368-74 (1977); Note, *The Interpretative Rule Exemption: A Definitional Approach to Its Application*, 15 Ind. L. Rev. 875 (1982).

[10] That the intent of the agency was critical to the court's holding is confirmed by the prior decisions from which the court drew its general principles. App. A at 7-8. *See, e.g., American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 558-60 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984); *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979). Moreover, while the court mentioned creation

[Footnote continued]

though not addressed explicitly in its opinion, the court's analysis also reflects the so-called "legal effect" or "binding effect" test used elsewhere by the D.C. Circuit to distinguish legislative from interpretative rules.[11]

None of these principles is adequate to provide a meaningful test. When an agency has been delegated the authority to promulgate legislative regulations, as EPA has under § 207(c)(2),[12] the test should focus on whether the agency has, in fact, exercised that delegated authority. As other courts have recognized, an agency's label and intent may bear little relationship to that inquiry, and both label and intent are far less important than the agency's actions.[13] Moreover, according significant weight to the agency's intent, label or disclaimer of binding effect carries the potential for self-serving circumvention of APA and Clean Air Act requirements.[14] Finally, the

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of new duties in its test, it conducted no analysis of the duties and obligations actually imposed by EPA's regulation. *See* pages 20-21, 27-28 *infra*.

[11] According to this test, a rule that an agency concedes will be given no legal or binding effect is considered interpretative. *See, e.g., Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278, 1290 (D.C. Cir. 1974), *rev'd on other grounds*, 426 U.S. 26 (1976); *National Nutritional Foods Ass'n* v. *Weinberger*, 512 F.2d 688, 698 n.8 (2d Cir.), *cert denied*, 423 U.S. 827 (1975); *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757, 763-64 n.12 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974).

[12] The distinction addressed here becomes relevant only when Congress has given an agency authority to engage in legislative rulemaking. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). Section 207(c)(2) of the Clean Air Act explicitly provides EPA that authority. *See also* § 301(a)(1) and § 307(d)(1)(L).

[13] *Detroit Edison Co.* v. *EPA*, 496 F.2d 244, 249 (6th Cir. 1974); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972). *See also Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942); *Department of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1149 (5th Cir. 1984) (a "paisley ribbon will not make up for damaged goods; the substance, not the label, is determinative").

[14] *See generally* M. Asimow, *supra* note 9, at 557-58; M. Warren, *supra*

[Footnote continued]

"legal effect" criterion used by the D.C. Circuit has been rejected elsewhere as mistaking the consequences of the distinction for a means to make the distinction.[15]

While the conflicting decisions by other Courts of Appeals do not provide a unified or settled alternative to the D.C. Circuit's approach, the decisions of several circuits and of this Court suggest that a primary element in making the distinction must be the existence of *congressional intent*. When Congress has actually expressed an intent in a statute or its legislative history, rules that essentially restate or explain Congress' intent may fairly be considered interpretative.[16] But when Congress has delegated to an agency the responsibility to add meaning to a provision, either by explicit direction or implicitly by not expressing any "actual intent" on an issue, the agency's implementing regulation must be legislative in nature. *See Chevron* v. *NRDC*, 104 S. Ct. at 2791, 2793 (1984); *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). Indeed, because the touchstone of statutory interpretation is congressional intent,[17] there can be no

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note 9, at 370. The context in which the regulation challenged here was promulgated is instructive. Far from being a dispassionate exercise in publishing a notice to advise the public of an EPA construction of the statute, the interpretative regulation was an advocate's response to a specific element of a GM remedial plan to which the agency's enforcement personnel objected. *See* pages 5-6 *supra*.

[15] *See, e.g., Alcaraz* v. *Block*, 746 F.2d 593, 614 (9th Cir. 1984) (this principle "is only an effect of the distinction[,] not a criterion of distinction"). *See also Levesque* v. *Block*, 723 F.2d 175, 181-82 (1st Cir. 1983) ("[e]very rule is intended to have some effect").

[16] *See, e.g., Powderly* v. *Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983) ("[i]nterpretative rules are those which merely clarify or explain existing law"); *Allen* v. *Bergland*, 661 F.2d 1001, 1006-07 (4th Cir. 1981) (an "interpretative rule effectuates no change in policy or law"); *Gosman* v. *United States*, 573 F.2d 31, 39 (Ct. Cl. 1978) ("merely clarifies or explains existing law or regulations"). *See also Chevron* v. *NRDC*, 104 S. Ct. at 2781-82 & n.9.

[17] *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962); 2A J. Sutherland, *Statutes and Statutory Construction* § 45.05 (Sands 4th rev. ed. 1984).

mere interpretation in cases where Congress had no actual intent. In those situations, the agency's regulation must be legislative.

This Court's decisions suggest that a second crucial element in making the distinction must be whether an agency's regulation involves significant *policy determinations*. An agency may formulate policy or reconcile competing policies only by exercising delegated responsibility that is inherently *legislative* in nature. But an agency promulgating an interpretative regulation, drawing on actual congressional intent, need not make policy determinations because Congress already has made them. Accordingly, this Court has held that when an agency makes policy determinations to fill gaps left explicitly or implicitly by Congress, it must do so by legislative rulemaking. *Morton* v. *Ruiz*, 415 U.S. at 231-35. *Accord*, *Chevron* v. *NRDC*, 104 S. Ct. at 2793; *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 422 (1942). With few exceptions, however, *see, e.g.*, *First Bancorporation* v. *Board of Governors*, 728 F.2d 434, 438 (10th Cir. 1984), the lower federal courts have failed to recognize this basis for distinguishing legislative from interpretative regulations.

Finally, several circuits consider the *impact* of a regulation in determining whether it is legislative or interpretative. Under this approach, a regulation imposing obligations which have a "substantial impact" reflects the agency's exercise of legislative authority, provided Congress delegated such authority.[18]

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[18] *Iowa Power & Light Co.* v. *Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *American Bancorporation, Inc.* v. *Board of Governors*, 509 F.2d 29, 33 (8th Cir. 1974); *Department of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1152-54 & n.19 (5th Cir. 1984); *American Transfer & Storage Co.* v. *ICC*, 719 F.2d 1283 (5th Cir. 1983); *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701-02 (5th Cir. 1979); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972); *Detroit Edison Co.* v. *EPA*, 496 F.2d 244 (6th Cir. 1974); *Cerro Metal Products* v. *Marshall*, 467 F. Supp. 869, 879-80 (E.D. Pa. 1979), *aff'd*, 620 F.2d 964, 981-82 (3d Cir. 1980).

The D.C. Circuit, on the other hand, along with the Ninth Circuit and the Temporary Emergency Court of Appeals, rejects the "substantial impact" approach for distinguishing between legislative and interpretative rules.[19] To the extent this Court has mentioned the point, it has taken the view, rejected by the D.C. Circuit, that one inherent characteristic of a legislative regulation is that it " 'affect[s] individual rights and obligations.' " *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979).

Only plenary consideration by this Court can reconcile these conflicting approaches and provide lower courts the necessary guidance for distinguishing between legislative and interpretative regulations.

B. The Court Of Appeals Should Have Invalidated EPA's Regulation As Legislative Rulemaking Conducted Without Notice And Comment.

The principles applied by the Court of Appeals in determining that EPA's regulation was interpretative led it to uphold EPA's regulation extending the recall remedy despite the agency's failure to conduct notice and comment rulemaking. Yet the

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[19] *Cabais* v. *Egger*, 690 F.2d 234, 237 & n.5 (D.C. Cir. 1982) (commenting on the conflict); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 558-60 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984); *Alcaraz* v. *Block*, 746 F.2d 593, 613 (9th Cir. 1984); *Rivera* v. *Becerra*, 714 F.2d 887, 889-91 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1591 (1984); *Energy Reserves Group, Inc.* v. *DOE*, 589 F.2d 1082, 1093-95 (Temp. Emer. Ct. App. 1978). *See American Trucking Ass'n* v. *United States*, 688 F.2d 1337, 1351-52 (11th Cir. 1982) (criticizing substantial impact test but constrained by Fifth Circuit precedent), *rev'd on other grounds*, 104 S. Ct. 2458 (1984); *Jean* v. *Nelson*, 711 F.2d 1455, 1479-80 n.20 (11th Cir. 1983) (same), *mooted prior to rehearing en banc*, 727 F.2d 957, 962 (1984).

The Ninth Circuit, in particular, has concluded that use of the substantial impact test is precluded by the holding in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), whereas the Fifth Circuit concludes that *Vermont Yankee* has no bearing on this distinction. *See Department of Labor* v. *Kast Metals Corp.*, 744 F.2d at 1154 & n.19.

Court of Appeals' opinions and the agency's treatment both establish that the regulation is inherently legislative, not interpretative, in nature. The issues resolved by EPA's regulation, including major policy determinations, thus are precisely the type which must be decided only with the benefit of public comment.

1. If Recall Liability Is To Be Extended Beyond The Statutorily Defined Useful Life For Passenger Cars, Legislative Rulemaking Is Required.

The Court of Appeals' analysis of the statute and its legislative history alone is sufficient to demonstrate the legislative nature of EPA's regulation. Congress defined the § 207(c) obligation to remedy nonconforming vehicles by explicit reference to the 5 year/50,000 mile useful life during which a vehicle must conform with emissions standards. GM argued below, therefore, that a manufacturer is not required to remedy a vehicle after its useful life has ended. EPA's argument focused on the fact that the statute requires that a recall notice be given to the owners of an entire class of vehicles. Because notice is classwide, EPA argued that every vehicle in the class which cannot be shown to have met the standards during its useful life must be repaired on recall regardless of age or mileage. The parties and the judges on the Court of Appeals all thought the language of the statute was clear on its face—but each "plain" meaning was markedly different.[20]

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[20] Judge Bazelon concluded for the panel majority and the *en banc* dissent that a manufacturer's liability for repair of a vehicle ended with its useful life, but acknowledged the possibility that EPA might adopt legislative regulations directed explicitly at delays in recall proceedings. App. B-1; App. A-24. Judge Wilkey believed that, properly interpreted, § 207(c) limits liability to vehicles still within their useful life at the time that a recall notice is given. He suggested that EPA might adopt by appropriate legislative regulation a mechanism for determining whether a vehicle was beyond useful life at that date. App. B-43. Judge Wald's panel dissent and *en banc* majority opinion agreed with EPA's interpretation. App. B-47; App. A-1.

GM contends that the only passage in the Act's legislative history bearing on the choice among these constructions of the repair obligation precludes EPA's open-ended construction. Commenting on the Senate bill provision that became § 207(c), the Senate Committee on Public Works explained that a manufacturer would not be required to repair a vehicle which had passed the 50,000 mile limit:

> "The 50,000-mile period can be assumed to be 4 to 5 years and the manufacturer should be expected to notify any owner of a vehicle that is five years old or less as to failure to continue to perform to the standard. *A decision not to require the manufacturer to repair the vehicle could be made after notice and after finding that the vehicle had exceeded the 50,000 mile warranty period.*" S. Rep. No. 1196, 91st Cong., 2d Sess. 30 (1970), *reprinted in* 1 1970 *Legislative History of the Clean Air Act* at 431 (emphasis added).

The Court of Appeals, however, dismissed the quoted legislative history as "irrelevant * * * for the purposes of determining the scope of the recall repair obligation," on the ground that the Senate Committee's explanation related only to an earlier version of § 207. App. A-20 (*en banc* majority).[21]

The Court of Appeals' analysis of the Senate Report, if correct, means that there is no relevant legislative history to disclose Congress' intent on the particular question whether a

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[21] Judges Bazelon, Tamm and Wilkey in dissent strongly disputed the majority's rejection of this legislative history. App. A at 40-41. Moreover, on October 26, 1984, in a different case, a D.C. Circuit panel ruled that the same legislative history *should* guide the court's interpretation of § 207(c)(1) because it dealt with a provision of the Senate bill "substantially the same as what is before us." *Center For Auto Safety* v. *Ruckelshaus*, 747 F.2d 1, 5. In that same passage, the court noted that the Senate Committee reporting the bill described this subsection as a "recall" provision. *Id.* at 5-6. Thus, in the space of seven weeks, the D.C. Circuit characterized the same legislative history inconsistently as "irrelevant" to the recall provisions of § 207(c) *and* as primary authority for determining the meaning of that section.

vehicle subject to notification must be repaired even though it has passed its useful life.[22] Indeed, EPA's own position in promulgating the regulation was that "[t]he legislative history of the Act offers little guidance" regarding the scope of the remedy. 45 Fed. Reg. at 36397.

Accepting *arguendo* EPA's characterization, the various formulations of GM, EPA and the Court of Appeals judges merely represent alternative resolutions of an issue not spoken to by Congress. By rejecting other alternatives and adopting its own approach, EPA necessarily has added substantive content to § 207(c)(1) and exercised delegated legislative rulemaking authority. *See Chevron* v. *NRDC*, 104 S. Ct. at 2782-83, 2793; *see also* pages 13-14 *supra*. For as Judge Bazelon aptly explained for the panel majority, "if the agency wishes to fill in interstices created by [this] congressional failure * * * the proper recourse is a legislative, not an interpretative, rule." App. B-35.

2. EPA's Regulation Conclusively Resolved Legislative Policy Issues In Order To Expand The Scope Of The Recall Program.

The agency "record" reveals, as the court below correctly discerned, that EPA's purported interpretative rule is predicated on substantive policy determinations made by the agency, not Congress. When "interpretation" of the law depends upon an agency's choice among alternative enforcement schemes for implementing a statute and reconciliation of "competing views of the public interest," the product of that

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[22] The court's conclusion left only broad policy arguments and general statements in the legislative history concerning the duty to notify owners of potentially nonconforming vehicles as justifications for upholding EPA's construction that repair liability is unlimited. *See* App. A at 14-17, 20-22. But the legislative history cited by the *en banc* majority merely confirms the statutory text requiring that all owners of vehicles in the class be notified. *See* page 16 *supra*; App. A-16. That legislative history says nothing about whether, after the notification, the remedy must also be class-based, as EPA contends, thus requiring repair of vehicles to which the § 202 standards no longer apply.

deliberation is a legislative regulation. *See, e.g., Chevron* v. *NRDC*, 104 S. Ct. at 2793.

The D.C. Circuit pointedly emphasized the policy choices motivating adoption of EPA's regulation. The court's rehearing order specifically directed the parties to file supplementary briefs focusing in part on:

> "the comparative benefits or deficits of the remedial schemes set forth in the EPA rule, and Judge Wilkey's and Judge Bazelon's panel opinions, in light of the statutory language and purpose." Order, April 3, 1984. App. C-4.

Indeed, the *en banc* majority even grounded its decision on respect for the policy choices the agency had made:

> "the dissent's extensive dicta, setting out what it dubs 'some reasonable alternatives,' *see* Diss. Op. at 20-24, is particularly inappropriate in light of the Supreme Court's recent warning that reviewing courts should respect the policy choices of administrative agencies. *See Chevron*, slip op. at 27-28." App. A-11 n.8.

The substantive policy determinations motivating EPA are similarly revealed by the materials EPA prepared to support its regulation. As a conclusion of general policy, EPA reasoned that more vehicles would be repaired if manufacturers bore the expense instead of car owners. App. H-4. EPA further concluded that a repair obligation not limited to useful life would add economic incentives for improved emissions control technology. App. H-7. Moreover, both the EPA staff memorandum and the preamble to the regulation speculated that, absent the requirement imposed by EPA's new regulation, manufacturers would benefit from delays in the administrative process. App. H-7; App. E at 6-7.

For all these reasons, EPA chose a policy of overinclusion, thereby enlarging the repair obligation beyond the statutory useful life. *See* pages 20-21, 27-28 *infra*. In the agency's view, seconded by the Court of Appeals, the public would be "bene-

fitted" if vehicles "can be repaired to decrease their pollution potential even after their useful lives have expired." App. A-21. But because EPA gave no notice and allowed no comment, the record is devoid of evidence to support the conclusion that the "benefits" of this policy choice outweighed the "deficits."

The need for notice and comment to resolve these and other policy questions is underscored by the fact that EPA's initial regulations implementing § 207(c)(1) were adopted by legislative rulemaking in 1974 after extensive public comments on their impact. 39 Fed. Reg. 44375. The new regulation depends every bit as much on substantive policy choices as the regulations it extended and, being legislative, cannot be adopted without notice and comment.

3. EPA's Regulation Has A Substantial Impact On Manufacturers' Recall Obligations.

The actual and intended impact of EPA's regulation is to impose substantial new obligations on vehicle manufacturers. The regulation mandates that every remedial plan "shall provide" for repair of vehicles "regardless of their age or mileage." App. E-9. By its own terms, the regulation is prescriptive in character and comparable in its impact to numerous other recall requirements of 40 C.F.R. § 85.1803(a).

EPA's regulation avowedly operates to increase substantially the number of vehicles a manufacturer must repair in a recall. *See* pages 27-28 *infra*. But beyond its intended effect, EPA's new regulation will also force repair of vehicles that complied with all legal requirements *throughout* their useful lives. While EPA disclaims any intention of requiring manufacturers to repair vehicles which, although part of a recall class, did not experience a nonconformity during their useful lives, *see* 45 Fed. Reg. 36396, 36397 n.2 (1980), App. E-4 n.2, this apparent concession is illusory. The manufacturer faces a nearly impossible burden in attempting to prove that an older vehicle, nonconforming when presented for repair, first exhibited the nonconformity after its useful life had passed. These

burdens will be especially substantial whenever a recall occurs late in the life of a class and many vehicles are past 50,000 miles.[23]

If any doubt remained, the threat of sanctions for omitting the new provision from a remedial plan proves the regulation's substantial impact. Nothing could state that impact more plainly than EPA's warning to GM that failure to include the new provision "can potentially subject GM to fines of up to $10,000 per vehicle." App. F-4. *See* M. Warren, *supra* note 9, at 371-72 (relying on the Final Report of the Attorney General's Committee on Administrative Procedure). The same intended impact on all manufacturers can be seen more broadly in EPA's characterization of the new requirement as a "nationally applicable regulation." By this designation, EPA explicitly invoked § 307(b) of the Clean Air Act to make the regulation permanently enforceable and immune from subsequent challenge. App. E-7.

II. GUIDANCE FROM THIS COURT IS NEEDED TO RESOLVE CONFUSION IN THE COURTS OF APPEALS OVER THE PROPER APPLICATION OF *CHEVRON*.

Having wrongly classified the challenged regulation as interpretative, the Court of Appeals then committed an equally fundamental error by applying an incorrect standard of judicial review. Specifically, the court below upheld EPA's regulation by extending to it the highly deferential standard of review for legislative regulations announced by this Court in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984). This second error independently warrants the exercise of this Court's jurisdiction.

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[23] The regulation contains no time limit for EPA's determination of nonconformity, although EPA's preamble stated that the determination could be made only when at least some vehicles in a class had not passed 5 years or 50,000 miles. *Compare* App. E at 3-4 *with* 40 C.F.R. § 85.1803 Appendix A. In any event, this "limit" does not alleviate the nearly insurmountable burden of proof discussed in the text.

A. The D.C. Circuit Improperly Applied The *Chevron* Standard Of Review To A Regulation That It Characterized As Interpretative.

Chevron held that in reviewing regulations adopted in the exercise of delegated legislative authority, courts must not disturb the agency's "'accomodation of conflicting policies'" provided the regulation "is based on a permissible construction of the statute." *Id.* at 2782, 2783.[24] In *Chevron*, EPA had conducted notice and comment rulemaking to define the term "stationary source" in order to fill a gap left by Congress in the Clean Air Act's nonattainment provisions. In recognition of the agency's authority to formulate policy in implementing the statute, this Court held that the agency's choice of the "bubble" concept was controlling. By its terms, *Chevron* mandates an especially deferential level of review for all policy-based, or legislative, regulations.

The *Chevron* standard contrasts both in its mandatory application and its level of deference with the standard traditionally applicable for the review of interpretative rules. Those rules have been accorded varying degrees of deference, depending upon their ability to persuade the judiciary in its role as the exclusive arbiter of statutory interpretation. As Justice Jackson explained for the Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944):

> "[T]he rulings, interpretations and opinions of the Administrator [are] not controlling upon the courts by reason of their authority, [but] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thorough-

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[24] This holding elaborated the meaning in this context of the familiar "arbitrary and capricious" standard prescribed for notice and comment rulemaking by both the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and § 307(d)(9) of the Clean Air Act.

> ness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Unlike the *Chevron* standard for legislative rules, the *Skidmore* analysis dictates that in many cases an agency's interpretative rule deserves little deference or none at all. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-143 (1976); *Frank Diehl Farms* v. *Secretary of Labor*, 696 F.2d 1325, 1329-31 (11th Cir. 1983); 2 K. Davis, *Administrative Law Treatise*, § 7:13 (2d ed. 1979 & Supp. 1982).[25]

Despite holding that EPA's rule was interpretative, the court below departed from the *Skidmore* analysis. Instead, the court began its review of EPA's "interpretative rule" by stating that in *Chevron* the Supreme Court had "recently outlined our proper task in reviewing an administrative construction of a statute that the agency administers." App. A-11 (*en banc* majority). Emphasizing that standard of special deference, the court held that EPA's rule and the policy determinations underlying it "enjo[y] adequate support" to uphold EPA's interpretation of § 207(c)(1). App. A-23.

The *en banc* dissent, by contrast, found the rule invalid when measured by the standards set out by this Court in *Skidmore*. App. A at 25-26, 46-47. Because EPA's rule did not represent a longstanding or contemporaneous construction or reflect thorough consideration, the dissent found that it deserved little deference. *Id.* at 26-27. Applying the *Skidmore* standard, the dissent concluded that EPA's regulation could not be sustained as an interpretative rule. *Id.* at 43-47. Reflecting the pivotal importance of *Chevron* to its decision, however, the *en banc*

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[25] *See also Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 n.13 (1981); *National Distributing Co.* v. *United States Treasury Department*, 626 F.2d 997, 1019 (D.C. Cir. 1980); *Daughters of Miriam Center for the Aged* v. *Mathews*, 590 F.2d 1250, 1258-59 (3d Cir. 1978); *General Electric Co.* v. *OSHA Comm'n*, 583 F.2d 61, 64 (2d Cir. 1978).

majority rejected the dissent's *Skidmore* analysis as conflicting with *Chevron* and failing to "respect [EPA's] policy choices." App. A at 11-12 n.8.

In so holding, the *en banc* majority improperly assumed that this Court intended *Chevron* to overrule *sub silentio* the traditional *Skidmore* standard of review for interpretative rules. Although not explicitly addressed in *Chevron*, the highly deferential standard articulated there cannot have been meant to extend to interpretative regulations. The bubble concept regulation challenged in *Chevron* had been promulgated following extensive notice and comment proceedings. 104 S. Ct. at 2787-90. Before deferring to the agency's policy choices, this Court first concluded that Congress had not expressed any "actual intent," thereby logically excluding from its analysis rules that are interpretative in character. *Id.* at 2781-82 & n.9; *see* pages 13-14 *supra*.

Throughout, this Court's opinion in *Chevron* emphasized the agency's delegated authority to reconcile "conflicting policies," which depends upon consideration of "policy arguments * * * more properly addressed to legislators or administrators, not to judges." *Id.* at 2783, 2793. Such "competing views of the public interest" can only be resolved, after notice and comment procedures afford the public an opportunity to be heard, through legislative rulemaking. *See* page 14 *supra*.

The D.C. Circuit's extension of *Chevron* to interpretative rules thus destroys the longstanding correlation between procedures for adopting regulations and the standards for judicial review of those regulations. Legislative regulations are given a high level of deference because they are adopted pursuant to notice and comment procedures that allow public participation to inform the agency's judgment. Interpretative rules, adopted without notice and comment rulemaking, receive less deference with the judiciary remaining the arbiter of statutory interpretation. *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984) ("the broad deference that reviewing

courts must give" under *Chevron* "makes it particularly important" that proper procedures be followed).[26] The D.C. Circuit's decision upsets this balance by allowing an agency's regulation implementing substantial policy determinations to be treated as interpretative and hence exempt from procedural safeguards while, at the same time, according it the high level of deference reserved for rules adopted with the benefit of public comment.

B. The Decision Below Conflicts With Other Circuits' Decisions As To The Applicability Of *Chevron*.

Even without a conflict among the circuits, the D.C. Circuit's extension of *Chevron* would be sufficiently important to merit this Court's review by certiorari. The decision here to apply the *Chevron* standard to interpretative rules was rendered by the Court of Appeals *en banc* and thus will govern that court's review of interpretative rules in all future cases. Not only does the D.C. Circuit receive the vast majority of petitions for review of agency regulations, but under the Clean Air Act and many other statutes, it is the only circuit where those regulations may be reviewed. Section 307(b). *See Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535-37 n.14 (1978). In addition, because of the D.C. Circuit's preeminence in deciding issues of administrative law, its holding is likely to influence the decisions of other circuits.[27]

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[26] *See also* cases cited at page 23 and n.25 *supra*. The more rigorous judicial scrutiny for interpretative regulations was one of the factors cited for exempting them from the general notice and comment requirements of rulemaking. *See* Legislative History of the APA, S. Doc. 248, 79th Cong., 2d Sess. 18 (1946).

[27] *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. at 535-37 n.14 (the decision by the D.C. Circuit "in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals").

Although *Chevron* was decided just last Term, the Courts of Appeals already are split over whether it applies to interpretative rules. The Ninth Circuit appears recently to have joined the court below in saying that *Chevron* applied to a regulation treated procedurally as interpretative.[28] *Alcaraz* v. *Block*, 746 F.2d 593, 606 (1984).

By contrast, the First and Second Circuits have declined to extend *Chevron* to interpretative rules. Thus, in *Capitano* v. *Secretary of Health & Human Services*, 732 F.2d 1066, 1076 (1984), the Second Circuit rejected the agency's argument that a Social Security Ruling, promulgated without notice and comment, should be given "authoritative effect" under *Chevron*. The court held that the highly deferential *Chevron* standard of review applies only to legislative, not interpretative, regulations. Similarly, the First Circuit has held in *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, 742 F.2d 1, 11 (1984), that *Chevron* is limited to determinations reflecting "agency policy," and does not apply to issues of statutory interpretation reserved to the judiciary.[29]

Accordingly, both the significance of the lower court's extension of *Chevron* to interpretative rules and the conflict among circuits as to the applicability of *Chevron* require plenary resolution of the issue by this Court.

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[28] *See also Livermore* v. *Heckler*, 743 F.2d 1396, 1408 (9th Cir. 1984)(Sneed, J., dissenting) (relying on *Chevron* in connection with review of a regulation interpretative in nature).

[29] Intertwined with this dispute is the related question raised by the D.C. Circuit and the First Circuit whether the appropriate standard of judicial review, under *Chevron*, "varies to some degree dependent on whether the statute's delegation of gap filling authority is explicit or implicit." *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984). *See Mayburg* v. *Secretary of Health & Human Services*, 740 F.2d 100, 106 (1st Cir. 1984).

III. THE COURT OF APPEALS' AFFIRMANCE OF EPA'S REGULATION HAS FAR-REACHING AND SEVERE IMPLICATIONS FOR VEHICLE MANUFACTURERS AND ALL OTHER PERSONS SUBJECT TO ADMINISTRATIVE REGULATION.

The agency's "interpretative" regulation, if allowed to stand, will have far-reaching and extraordinarily costly consequences for vehicle manufacturers, none of whom was allowed to comment on its rationale and impact. All motor vehicles sold in the United States since 1970 are subject to the Clean Air Act emissions standards enforced by EPA through its compliance programs. Emissions standards have become progressively more stringent, requiring the development and application of increasingly complex technology designed to achieve compliance with the standards throughout the vehicles' useful lives.[30]

The agency's new regulation significantly expands manufacturers' obligations and liability under this program. Over 22 million vehicles have been recalled to remedy emissions problems since the early 1970's, either voluntarily by manufacturers or by EPA order. Moreover, the rate of emissions recalls has increased since 1980, with annual recall totals escalating from 837,000 in 1979 to more than 3 million in 1983.[31] EPA's regulation, by eliminating the "useful life" limitation on the repair obligation, will increase dramatically the number of vehicles eligible for repair in these recalls. In the Cadillac recall alone,

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[30] The tightening of emissions standards has required reductions for 1984 model year vehicles of 95% for hydrocarbons, 96% for carbon monoxide, and 77% for nitrogen oxides, since the standards first became effective. *See* 40 C.F.R. § 86.084-8 (1984); "Compilation of Air Pollutant Emissions Factors: Highway Mobile Sources," EPA 460/3-81-005, Tables 1.1.2A, 1.1.2B, 1.1.2C (March 1981).

[31] *See* May 9, 1980 EPA Staff Memorandum, Attachment 7. Even greater emphasis on recall enforcement measures, including increased monitoring and testing, is planned for the future. *See generally* EPA, Office of the Comptroller, "Summary of the 1985 Budget," at 17, 19 (January 1984).

for example, GM estimated in 1980 that the new requirement would increase *fourfold* the number of vehicles to be repaired at its expense, nearly 170,000 more vehicles than the statute requires. Ct. Appeals Joint App. at 257–58.

Important as this case is, the implications of the decision below extend far beyond the motor vehicle industry. The legislative-interpretative distinction arises in connection with hundreds of regulations each year. Although the classification may be straightforward in some instances, for many others it depends upon the test applied. When the "interpretative" label is wrongly assigned, all interested parties, ranging from businesses to the disadvantaged, lose the opportunity to be heard in the rulemaking process.

As shown by a number of leading cases, agencies have invoked the "interpretative" rule exception for regulations that sought to alter the standards to qualify for food stamps,[32] eliminate IRS requirements that determine whether hospitals must provide medical services free or at reduced cost for those unable to pay,[33] alter eligibility for AFDC benefits,[34] revise the standards which govern whether non-resident aliens may enter and obtain employment in the United States,[35] change markedly the conditions for approval of new drug products,[36] and eliminate variance provisions from implementation plans under the Clean Air Act.[37] Notwithstanding the nature of

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[32] *Compare Levesque* v. *Block*, 723 F.2d 175 (1st Cir. 1983), *with Alcaraz* v. *Block*, 746 F.2d 593 (9th Cir. 1984).

[33] *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278 (D.C. Cir. 1974).

[34] *Allen* v. *Bergland*, 661 F.2d 1001 (4th Cir. 1981).

[35] *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972).

[36] *Pharmaceutical Manufacturers Ass'n* v. *Finch*, 307 F. Supp. 858 (D. Del. 1970).

[37] *Detroit Edison Co.* v. *EPA*, 496 F.2d 244 (6th Cir. 1974).

these agency actions and the severity of the consequences for those affected, the decision below would allow such regulations to be adopted without notice and comment and then to be upheld on the merits based on deference to the agencies' policy choices. Only this Court's guidance can reconcile the conflicting approaches among the Courts of Appeals and maintain adherence to the procedural safeguards that should be followed when agencies engage in legislative decisionmaking having such sweeping repercussions for the public.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

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Dated: January 7, 1985

84-1098

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1868

GENERAL MOTORS CORPORATION,
a Delaware Corporation, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

No. 80-2027

GENERAL MOTORS CORPORATION,
a Delaware Corporation, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 81-1029

GENERAL MOTORS CORPORATION,
a Delaware Corporation, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

Petitions for Review of an Order of the
Environmental Protection Agency

Argued April 25, 1984

Decided September 7, 1984

Theodore Souris and *George F. Ball*, with whom *Michael B. Lewiston*, *James A. Smith*, *Terrance B. Larkin*, *Frederick J. Dindoffer* and *William L. Weber, Jr.* were on the brief, for petitioner in Nos. 80-1868, 80-2027 and 81-1029.

Jose R. Allen, Attorney, Department of Justice, with whom *A. James Barnes*, General Counsel, *Gerald K. Gleason*, Assistant General Counsel, *Robert A. Weissman*, *Samuel I. Gutter*, Attorneys, Environmental Protection Agency, *David E. Dearing* and *John Wittenborn*, Attorneys, Department of Justice, were on the brief, for respondent. *Angus MacBeth*, *Donald W. Stever, Jr.* and *Rosanne Mayer*, Attorneys, Department of Justice also entered appearances for respondent.

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, SCALIA and STARR, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WALD.

Dissenting opinion filed by *Senior Circuit Judge* BAZELON in which *Circuit Judges* TAMM and WILKEY join.

WALD, *Circuit Judge*: In this appeal, the General Motors Corporation (GM) challenges the authority of the Environmental Protection Agency (EPA or Agency) to require manufacturers, as a part of a recall pursuant to the Clean Air Act, to repair cars and engines, which are members of the recall class, but which have exceeded their statutory "useful lives" of five years or 50,000 miles at the time of repair. In 1980, the EPA promulgated what it termed an "interpretive rule," embodying its consistent regulatory practice since the enactment of the Clean Air Act Amendments of 1970, requiring manufacturers to repair all members of a recall class, regardless of their age or mileage at the time of repair. Soon thereafter, in accordance with the interpretative rule, the agency ordered GM to submit a remedial plan for a class of recalled Cadillacs that included all class members regardless of age or mileage. In its petitions to this court, GM contends that (1) the EPA rule is a legislative, not interpretative, rule, and therefore the rule is void for failure to comply with the notice and comment procedures set down by the Administrative Procedure Act, and (2) in any event, the rule runs counter to the recall provision of the Clean Air Act and therefore is an invalid interpretation of the statute. GM consequently challenges the validity of both the interpretative rule and the agency order that applied the rule to the recall of GM automobiles. For the reasons stated below, we hold that the EPA rule is a valid interpretative rule, supported by the language, purpose and legislative history of section 207(c) of the Clean Air Act Amendments of 1970. We accordingly deny GM's petitions.

I. BACKGROUND

On March 21, 1977, after an EPA investigation and testing by both EPA and GM, the Administrator of the EPA notified GM pursuant to section 207(c)(1) of the Clean Air Act that the class of 1975 Cadillacs with type 230-carburetors did not conform with federal standards for carbon monoxide emission, and ordered GM to "submit a plan for recalling and remedying the nonconformity of the vehicles."[1] At the same time, the Administrator expressed concern that another set of 1975 Cadillacs—with type 193-carburetors—also exhibited nonconformity with the carbon monoxide standards, but he refrained from initiating a formal recall of that class in order to give GM an opportunity to sustantiate its "strong protestations" that this latter class did not violate the standards. *See* Letter from Douglas M. Costle. EPA Administrator, to E.M. Estes, President of GM (March 21, 1977), *reprinted in* Joint Appendix (J.A.) at 122-24.

Five weeks later, GM filed a proposed remedial plan for the 230-carburetor Cadillacs, and as a part of the plan offered to recall the 193-carburetor Cadillacs voluntarily.[2] *See* J.A. at 126-27. EPA did not approve the

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[1] Letter from Douglas M. Costle, EPA Administrator, to E.M. Estes, President of GM (March 21, 1977), *reprinted in* Joint Appendix (J.A.) at 122-24. While it was and is the agency's policy to encourage voluntary recalls, the Administrator "fe[lt] compelled to issue th[e] order" because "General Motors' acquiescence to recall comes at the end of more than two years of EPA investigation and GM opposition, and after assemblage of the most convincing case yet for recall." *Id.* Moreover, the Administrator expressed "some concern over the likelihood of actual implementation by dealers of the remedy proposed by General Motors and wish[ed] to preserve [the] right to approve the remedy to be actually pursued." *Id.*

[2] The remedial plan initially submitted by GM covered "all 1975 Cadillac models except those built with California Emission Controls." Remedial Plan for 1975 Cadillacs (April 27,

plan, however, and negotiations continued for two years between the agency and GM over the effectiveness of the proposed repairs and the manufacturer's obligation to audit the performance of completed repairs. Finally, on December 26, 1979, the EPA withdrew its demand that GM conduct an audit, deciding instead to conduct the audit itself, and approved GM's amended remedial plan.[3]

At that time, however, GM urged the EPA to cancel the recall, arguing that "as a direct result of the delays incurred since our first remedial plan was submitted, a point of drastically diminished returns has been reached." Letter from T.M. Fisher, Automotive Emission Control Director for GM, to Benjamin R. Jackson, EPA Deputy Assistant Administrator for Mobile Source and Noise Enforcement (Feb. 5, 1980), *reprinted in* J.A. at 258. More specifically, GM contended for the first time that "only those vehicles within the lesser of five years or 50,000 miles of operation at the time of presentation to the dealer for repairs will receive the [remedial repairs] at General Motors [sic] expense."[4] *Id.*, *reprinted in* J.A. at 259. GM thus believed that so few Cadillacs in the class would be subject to recall because of their age or mileage that the recall should not be implemented at all.

1977), *reprinted in* J.A. at 129. The plan specifically provided that "[a] vehicle affected will be eligible for repair under the remedial plan, regardless of vehicle age, mileage, or owner." *Id.*, *reprinted in* J.A. at 131.

[3] *See* Letter from Benjamin R. Jackson, Deputy Assistant Administrator for Mobile Source and Noise Enforcement, to T.M. Fisher, Director of GM Automotive Emission Control (Dec. 26, 1979), *reprinted in* J.A. at 252-55.

[4] GM contends that its 1980 letter merely restated a position it had taken a year earlier in negotiations with the EPA. *See* GM Brief at 5. EPA, however, asserts that the letter represents "the first time that GM had proposed to impose a 5/50 [useful life] limitation on a remedial plan." EPA Brief at 11. Nothing in the record shows that GM presented this limitation prior to its 1980 letter.

On May 30, 1980, the EPA promulgated the rule at the center of dispute in this case. *See* 45 Fed. Reg. 36,396 (May 30, 1980). Under the rule, all remedial plans filed under section 207(c) of the Clean Air Act "shall provide that the manufacturer will remedy, at the manufacturer's expense, all properly maintained and used vehicles which experienced the nonconformity during their useful lives *regardless of their age or mileage at the time of repair.*" 40 C.F.R. Subpart S App. A (emphasis added). Applying this rule to the recall of the 1975 Cadillacs, the EPA on June 23, 1980 approved GM's Cadillac remedial plan insofar as it applied to vehicles within their useful lives at the time of repair, and ordered GM to submit a plan for the repair of automobiles within the recall class "which failed or will fail to conform to applicable emission standards during their useful lives but will be beyond their useful lives at the time of repair." Letter from Charles N. Freed, EPA Acting Assistant Deputy Administrator for Mobile Source, Noise and Radiation Enforcement, to T.M. Fisher, Director of Automotive Emission Control for GM (June 23, 1980), *reprinted in* J.A. at 263.

GM then petitioned this court, challenging both the May 30 rule and the June 30 recall determinations.[5] GM argues that (1) the May 30 rule constituted a legislative rulemaking, despite EPA's characterization of the rule as "interpretive," and therefore the EPA failed to follow the notice and comment procedures required before such rules may be promulgated, and (2) by requiring the repair of automobiles beyond their useful lives, the rule exceeds the EPA's authority under section

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[5] On November 26, 1980, the EPA published a notice in the *Federal Register* declaring its partial approval and partial disapproval of GM's remedial plan to be "final." *See* 45 Fed. Reg. 78798 (Nov. 26, 1980). GM subsequently filed a protective petition, consolidated with its previous appeals, seeking review of this *Federal Register* notice.

207(c) of the Clean Air Act. For the reasons explained below, we disagree with both of GM's contentions.

II. The EPA Rule Is an Interpretative Rule

EPA styled its May 30 rule as an "interpretive rule." *See* 45 Fed. Reg. 36,396 (May 30, 1980). As a preliminary matter, GM challenges this characterization, contending that the May 30 rule is, on the contrary, a "legislative rule" and is consequently void for failure to follow the notice and comment procedures required for the promulgation of such rules. *See* 5 U.S.C. § 553. Because we find that EPA properly categorized the May 30 rule, we conclude that notice and comment procedures were not required. *See id.* § 553(b)(A).[6]

In a turn of phrase particularly apt in this case, the distinction between legislative and nonlegislative rules has been described as "enshrouded in considerable smog." *American Bus Association* v. *ICC*, 627 F.2d 525, 529 (D.C. Cir. 1980) (quoting *Noel* v. *Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975) (discussing definition of "general statement of policy")). Nonetheless, there are certain general principles that aid reviewing courts in making the determination whether a given rule is legislative or interpretative. First, the agency's own label, while relevant, is not dispositive. *See, e.g., Chamber of Commerce* v. *Occupational Safety and Health Administration*, 636 F.2d 464, 468 (D.C. Cir. 1980); *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 879 n.171 (D.C. Cir. 1979). An interpretative rule

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[6] The APA exempts from its notice and comment procedures "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Similarly, the Clean Air Act exempts from its special rulemaking procedures "any rule or circumstance, referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5." 42 U.S.C. § 7607(d)(1). Accordingly, interpretative rules are not subject to the procedural requirements set down by either the APA or the Clean Air Act.

simply states what the administrative agency thinks the statute means, and only "'reminds' affected parties of existing duties." *Citizens to Save Spencer County*, 600 F.2d at 876 & n.153; *see also Chamber of Commerce*, 636 F.2d at 469. On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule. *See, e.g., American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 558-59 (D.C. Cir. 1983); *Citizens to Save Spencer County*, 600 F.2d at 876.

In light of these general principles, we find that the May 30 rule constitutes an interpretative rule. We note, to begin with, that the agency regarded its rule as interpretative. *See* 45 Fed. Reg. 36,396 (May 30, 1980) ("*Action*: Interpretive Rule"). Moreover, EPA's entire justification for the rule is comprised of reasoned statutory interpretation, with reference to the language, purpose and legislative history of section 207(c). *See id.* at 36397-98. Indeed, the language of the rule itself indicates its interpretative nature. *See* 40 C.F.R. Subpart S App. A ("The purpose of this rule is to set forth EPA's interpretation . . . under section 207(c)(1) of the Clean Air Act . . . .") Finally, and most importantly, the rule did not create any new rights or duties; instead, it simply restated the consistent practice of the agency in conducting recalls pursuant to section 207(c).[7]

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[7] The dissent contests this proposition, and calls it "a proposition upon which the majority places substantial weight." Diss. Op. at 3. At the outset, it should be made clear that this proposition is significant primarily in support of the conclusion that the EPA rule is *interpretative*, and not legislative, a proposition with which the dissent agrees. *See* Diss. Op. at 1 & n.3.

In its attempt to make light of the EPA's historical adherence to its current interpretation, the dissent asserts that the EPA interpretation has only "a lifespan barely exceeding one year" because the sole *controversy* over the interpretation occurred in 1979. *See* Diss. Op. at 3 n.11. However, as the EPA observed when it issued its interpretative rule "[i]n

Accordingly, we hold that the May 30 rule was an interpretative rule. The EPA therefore was not required to follow notice and comment procedures prior to the adoption of the rule. *See* 5 U.S.C. § 553(b)(A). We now

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the past, manufacturers have not conditioned a vehicle's eligibility for recall repair . . . on the basis of the vehicle's age or mileage." 45 Fed. Reg. at 36,397. Rather than diminishing the rule's status as a longstanding EPA interpretation, the absence of any prior controversy over the repair of cars exceeding their useful lives demonstrates the reasonableness of the EPA's interpretation of its own regulatory scheme. *See, e.g.*, Esquire, Inc. v. Ringer, 591 F.2d 796, 801 (D.C. Cir. 1978) (Bazelon, J.) (administrative interpretation deserves "controlling weight," particularly when it "has been consistently followed for a significant period of time"), *cert. denied*, 440 U.S. 908 (1979); DeLano v. United States, 393 F.2d 517, 521 (Ct. Cl. 1968) ("A strong indication of the reasonableness of that [administrative] construction is the fact that [the regulated parties] never challenged it" even though it was "consistently maintained by the agency."). Apparently, virtually every manufacturer engaging in a recall has voluntarily included older cars in its own remedial plans.

The dissent mistakenly speculates that "manufacturers in previous recalls have failed to raise the question of liability for repair of cars beyond their useful lives because the involvement of such vehicles in the recalls has been *de minimis*." Diss. Op. at 4 n.12. The dissent here loses sight of the facts. Despite its view that "virtually all" of the recalls involved tiny percentages of older cars, in six out of the fifteen recalls described in detail in the record, *see* J.A. at 278-96, the EPA issued a recall notice to the manufacturer 34-55 months after the cars were on the market. Under EPA's method of calculating the percentage of cars recalled that were beyond their useful lives, *see* J.A. at 275, these recalls involved large quantities of older cars. For example, the Pontiac recall, initiated in 1979, involved 1975 model year cars, *54%* of which were beyond their useful lives. *See* J.A. at 293. Moreover, almost *30%* of the 1976 Pontiacs involved in that recall had exceeded their useful lives at the time of manufacturer notice. Similarly, in 1978 EPA initiated a recall that included 1975 Fords, approximately *28%* of which had exceeded their useful lives. *See* J.A. at 289. Also, in 1978 the EPA began a recall that included 1974 AMC cars sold in California, approxi-

consider whether the interpretative rule is valid under section 207(c) of the Clean Air Act.

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mately *56%* of which were beyond their useful lives. *See* J.A. at 291-92. Any manufacturer who "prophetically foresaw" the dissent's position, Diss. Op. at 4 n.12, believing these recalls exceeded the legal scope of coverage, could reasonably have been expected to make an objection.

Moreover, at least three other recalls included substantial numbers of olders cars. *See* J.A. at 280 (1974 Pontiacs; approximately 22% beyond useful lives); J.A. at 288 (1975 Fords; approximately 16% beyond useful lives); J.A. at 296 (1977 Buicks; approximately 28.5% beyond useful lives).

The dissent obfuscates the issue by claiming that the above discussion "neglect[s] the fact" that some of these recalls included younger cars in addition to older cars, and that the "AMC recall was complicated by the more stringent emissions standards" applicable only in California. Diss. Op. at 4 n.12. However interesting, these details are irrelevant to the dissent's assertion that the manufacturers "failed to raise the question of liability for repair of cars beyond their useful lives because the involvement of such vehicles in the recalls has been *de minimis.*" *Id.* The recall of younger cars in addition to older cars in no way detracts from the fact that *there were substantial numbers of older cars involved in these recalls.* The relevance of the California air emission standards to the dissent's position is at best obscure.

In a final aside, the dissent invokes the fact that "owner responses to recalls drop dramatically with the age of the vehicle." *Id.* Such statistical sport, however, ignores the fact that the manufacturer incurs heavy costs—both financial and good will—simply by issuing its *notice* to owners. Moreover, while the response rate declines as time goes by, *the percentage of older cars in the recall sales rises commensurately. See* J.A. at 275, 298. Therefore, whatever the age of the recall class, the manufacturer would still have a substantial stake and ample incentive to raise the useful life issue.

In sum, the dissent fails in its attempts to transmogrify *the absence of controversy* over the EPA's policy into *the absence of any EPA policy* on the useful life limitation. Taken individually or cumulatively, the dissent's efforts to invent *post hoc* rationalizations for the manufacturers' failure to challenge the EPA's policy are similarly unconvincing. The EPA

III. The EPA Rule Is a Permissible Interpretation of Section 207

The EPA's May 30 rule finds substantial support, and no contradiction, in the language and legislative history of section 207 of the Clean Air Act. Moreover, the May 30 rule effectuates important public policy goals embodied in the Act. Accordingly, we uphold the validity of the EPA rule at issue in this case.

The Supreme Court has recently outlined our proper task in reviewing an administrative construction of a statute that the agency administers. First, we must determine whether Congress "has directly spoken to the precise question at issue." *Chevron, U.S.A.* v. *National Resources Defense Council*, No. 82-1005, slip op. at 4 (June 25, 1984). If the administrative construction runs counter to clear congressional intent, then the reviewing court must reject it. *See id.* at 4 n.9; *see also FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). On the other hand, if the administrative construction does not contravene clearly discernible legislative intent, then the reviewing court "does not simply impose its own construction on the statute." *Chevron*, slip op. at 5. Instead, we then must conduct the "narrower inquiry into whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court." [8] *Democratic Senatorial Campaign Committee*, 454 U.S. at 39; *see Chevron*, slip op. at 5.

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has consistently approved only those remedial plans that included all cars and engines in the recall class, regardless of their age or mileage. It therefore constitutes a longstanding administrative policy.

[8] It is difficult to square the dissent's position with these recent pronouncements by the Supreme Court. Although the dissent attempts to invoke the "plain meaning of the statute," Diss. Op. at 8, in truth it argues only that the useful life limitation should be imported into the recall provision. *See id.* at 7-8. However, nothing in the language or legislative history of the recall provision compels this result. *See infra*

We begin our review with an examination of the statute. Section 207(c)(1) provides, in pertinent part:

> If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the [EPA emission standards], when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given.

42 U.S.C. § 7541(c)(1). The EPA interprets this provision to authorize the recall of all members of a nonconforming class, except those not "properly maintained and used," regardless of the age or mileage of any given member. We think the statute provides ample support for such an interpretation.

The statute requires manufacturers to submit remedial plans for "vehicles or engines with respect to which . . . notification is given," and directs the EPA Administrator to give such notification with respect to a "class or

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at pp. 13-16. The absence of a useful life limitation in the recall provision should be compared with the *express* limitation of the manufacturer's liability under the *warranty* provision to emissions violations occurring during a vehicle's "useful life." *Compare* 42 U.S.C. § 7541(c)(1) (recall provision) *with id.* § 7541(a) (warranty provision). *See infra* at pp. 19-20.

Similarly, the dissent's extensive dicta, setting out what it dubs "some reasonable alternatives," *see* Diss. Op. at 20-24, is particularly inappropriate in light of the Supreme Court's recent warning that reviewing courts should respect the policy choices of administrative agencies. *See Chevron*, slip op. at 27-28. The question presented today is whether the agency's action is a reasonable one in light of the existing statutory constraints, and it is not the job of the courts to propose rules that they would prefer the agency to adopt.

category of vehicles or engines," a substantial number of which exhibited nonconformity during their useful lives. The statute thus provides for notice on a class-wide basis and further requires the manufacturer to remedy all cars with respect to which such notice is given. In light of this class-based orientation of section 207(c)(1), we think the EPA reasonably mandated that remedial plans be designed to cover all members of a recall class. The agency reasonably required the manufacturers to include a car or engine in their remedial plans if (1) a substantial number of cars within a given class exhibited nonconformity during their useful lives, and (2) the car is a member of that class. Section 207(c) affords an ample basis for this requirement.

GM nevertheless argues that individual vehicles and engines that have exceeded their useful lives cannot possibly exhibit a "nonconformity," because the Clean Air Act's emission standards apply only to vehicles and engines within their useful lives. *See* 42 U.S.C. § 7521(a)(1). Since section 207(c) requires manufacturers to devise remedial plans so that a recall will "remedy the nonconformity" of the class, GM concludes that its remedial obligations extend only to those members of a recall class that are within their useful lives at the time of repair.

However, while it is true that the emission standards apply only to individual cars and engines during their useful lives, it does not follow that only those cars and engines within their useful lives may be recalled. Indeed, the question presented by this case is whether a member vehicle or engine of a recall class that has exceeded its useful life should nevertheless be repaired under section 207(c) at the manufacturer's expense. That question is not settled by the definition of "useful life"; rather, it turns on the intended scope and purpose of the recall provision. As we have explained above, section 207(c) provides for classwide remedies of classwide defects.

Accordingly, EPA reasonably reads the section to require the manufacturers to submit plans to "remedy the nonconformity" *of the recall class*. After all, a defective *class*—the members of which do not satisfy the emission standards during their useful lives—can be considered "nonconforming." Hence the May 30 rule is not precluded by the statute's definition of "useful life."

Moreover, assuming *arguendo* that only individual cars and vehicles within their useful lives could exhibit a "nonconformity," a plan "for remedying the nonconformity" could still include cars or engines beyond their useful lives at the time of repair. Through the recall scheme, Congress obviously intended the EPA to conduct tests on representative samplings of cars and engines, and to base its decision to recall on such tests.[9] Unless Congress

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[9] The dissent erroneously concludes that the EPA rule "would expose the manufacturer to liability for repair virtually indefinitely." Diss. Op. at 13. The statute, however, authorizes the Administrator to institute a recall only after determining that a substantial number of vehicles or engines in the class "do not conform to the [emission standards] *when in actual use throughout their useful life.*" 42 U.S.C. § 7541 (c) (1) (emphasis added). Since cars and engines *older than five years of age* are no longer within their useful lives, this statutory condition cannot be met "indefinitely." There is, at the very least, this definite time limitation on the Administrator: he must conclude his testing before the entire recall class has exceeded five years of age.

Moreover, special problems might arise when a proposed recall class includes numerous model years of a particular car or engine, some of which have entirely exceeded their useful lives at the time the EPA conducts its testing. *See* Diss. Op. at 14-15 (hypothesizing such a class). The design of some features of a class of cars or engines might be altered from one model year to another. If these changes could affect the level of auto emissions, then the EPA's testing of only the models within their useful lives might not be conclusive as to the nonconformity of the *entire* class proposed for recall. However, since the recall class presented in this case does not raise this problem, we need not decide this hypothetical. Suffice it to say that our reading of the statute amply permits

wanted the EPA to test every car in a class—an absurd prospect—it was willing to allow a statistical inference from representative testing that all members of the class exhibit a nonconformity during their useful lives. Once it is established that a car was out of compliance with emission standards during its useful life, a reasonable remedy could include the repair of the car to compensate for the pollution caused during the time of its violation. Therefore, once the EPA establishes that members of a recall class were generally nonconforming during their useful lives, a reasonable method of "remedying the nonconformity" includes the repair of all members of the class, even if some had exceeded their useful lives.[10] We note that under the EPA rule, if a certain car or subclass of cars were in compliance during the five year or 50,000 mile period. then the manufacturer need not repair that car or subclass of cars.[11] *See* 45 Fed. Reg.

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the EPA to recall cars and engines regardless of their age at the time of recall. We do not address today the possible contraints upon the EPA in defining the reasonable scope of a recall class.

[10] At oral argument and in its supplemental brief, the EPA attested to its flexibility in devising appropriate and reasonable remedial schemes for older cars and engines. We do not find, and GM does not contend, that the remedy proposed for the Cadillacs in this case is unreasonable.

[11] The dissent complains that "the EPA's rule establishes an absolute and irrebutable presumption that *all* older cars were among the precentage failing to meet standards during their useful lives." Diss. Op. at 19-20. However, it is the *statute* that establishes the presumption that the cars and engines within a class exhibiting substantial nonconformity are individually nonconforming. Moreover, this presumption is not "absolute and irrebuttable"; the manufacturer is free to come forward with evidence that an individual car or engine, or a particular subclass of cars and engines, were in fact conforming during their useful lives. The results of on-the-road testing would be particularly relevant to this inquiry.

This same proof problem, of course, would be present in the implementation of the dissent's proposal to permit the Ad-

36,397 n.2 (May 30, 1980) ("the manufacturer is not responsible to remedy the nonconformity of a vehicle which, although part of the recall class, experienced the nonconformity only after expiration of the vehicle's useful life").

The legislative history similarly supports EPA's interpretative rule. The Report of the Senate Public Works Committee—upon which GM heavily relies, *see infra* at p. 18—refers to the recall of an entire "model or class" of vehicles or engines. S. Rep. No. 1196, 91st Cong., 2d Sess. 29 (1970). The Senate Committee bill designed two methods for EPA to assure in-use compliance with emission standards. First, after the development of a "quick test" method, the EPA could test the continuing compliance of "individual vehicles on the road." *Id.* Alternatively, the EPA could conduct more intensive examinations of "representative sample[s] of a model or class," and, after a finding of classwide noncompliance, EPA "could require the manufacturer to recall that model or class." *Id.*; *see id.* at 111 (section 207 of S. 4358) (if EPA finds that "statistically representative samples of any class or category of vehicles or vehicle engines . . . do not conform," then all "vehicle engines included within the class or category" should be notified); *id.* at 62-63 (section-by-section analysis) after the EPA "discovers defects through testing" of a class of vehicles or engines, it "shall order the manufacturer to notify . . . purchasers *of the defect*") (emphasis added).

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ministrator to recall cars and engines that were within their useful lives at the time of the notice of nonconformity. Under this proposal, manufacturers would be required to repair cars and engines exceeding their useful lives without any showing that the particular cars or engines had violated the emission standards during their useful lives. The dissent's proposal, to be practical, must also follow the statutory presumption that members of the recall class were nonconforming during their useful lives.

Furthermore, when Congress revisited section 207(c) in 1977, the discussion assumed that the recall provision extended to all member vehicles or engines of the nonconforming classes. *See, e.g.*, H. Rep. No. 294, 95th Cong., 1st Sess. 497 ("if a substantial number of systems fail during their on-the-road operation, the EPA can recall the entire lot for repair at the manufacturer's expense"); *id.* at 498 (noting the possibility of "a recall of all of that model vehicle or engine type"); 6 Environmental Policy Division of the Congressional Research Service of the Library for the Comm. on Environment and Public Works, 95th Cong., 2d Sess. 4540 (1978) (preliminary statement of Sen. Bentsen) ("section 207 (c) authorizes the Agency to require the automaker to recall *a given model run for needed repairs* if the Agency determines that a substantial number of that model or engine type do not conform to the standards when in actual use") (emphasis added); *id.* at 1220 (preliminary statement of Sen. Riegle) ("If a substantial number of systems fail during their on-the-road operation, the EPA can recall the entire lot for repair at the manufacturer's expense"). Given these indicia of the congressional understanding of section 207(c), and the contemporaneous administrative policy (as evidenced by manufacturers' remedial plans, *see supra* at p. 4), it is reasonable to assume that Congress reaffirmed the EPA's understanding of its recall authority when it revisited and ratified the recall provision in 1977. There is not a shred of evidence to the contrary.[12]

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[12] In addition, EPA's class-based interpretation of section 207 enjoys precedential support. This court, in one of the few judicial cases to construe the recall provision, observed that "[u]nlike the discovery and cure of nonconformity of individual vehicles under the warranty provisions, the remedy at this stage is recall of the *entire class* of vehicles in order to correct the design, material, or workmanship defect." Chrysler Corp. v. EPA, 631 F.2d 865, 868 (D.C. Cir.) (emphasis in original), *cert. denied*, 449 U.S. 1021 (1980).

Nonetheless, GM contends that one bit of legislative history contradicts the EPA's interpretation. Specifically, GM heavily relies upon one passage from the Report of the Senate Public Works Committee. In discussing a provision that was the precursor to section 207 as finally enacted, the Report said:

> The Committee also recognizes the difficulty in any recall provision of notifying the owners of vehicles. The Committee expects that the manufacturer would not only depend on the files of the franchise dealer, but would, to the extent practicable, use State motor vehicle department registration files to obtain the names and addresses of subsequent purchasers of cars. By establishing a 50,000 mile, no year lifetime for the purpose of warranty, the Committee did not intend to relieve the automobile manufacturers of their responsibility to notify owners of older cars. The 50,000-mile period can be assumed to be 4 to 5 years and the manufacturer should be expected to notify any owner of a vehicle that is five years old or less as to failure to continue to perform to the standard. A decision not to require the manufacturer to repair the vehicle could be made after notice and after finding that the vehicle had exceeded the 50,000-mile warranty period.

S. Rep. No. 1196, *supra*, at 31. GM believes that this passage constitutes a clear indication that Congress intended to limit the manufacturers' recall obligations to exclude cars and engines beyond their useful lives.

We disagree. In the first place, we would be very hesitant to overrule a reasonable agency interpretation, which enjoys support in the statutory language and other portions of legislative history, on the basis of a single, and rather ambiguous, passage from a committee report.[13] Furthermore, as explained below, we find that

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[13] As this court, sitting *en banc*, observed:

> [I]t must be remembered that committee reports are not the law; they are only aids in interpreting statutory

this passage in no way undermines the EPA's interpretation of section 207, because the Senate bill under consideration at the time the Committee wrote its report did not contain a recall provision similar to the provision finally embodied in section 207. Accordingly, we conclude that nothing in the legislative history runs counter to the EPA's May 30 rule.

The Senate bill did not impose upon manufacturers any recall repair obligation; it provided only for the warranty repair obligation. Section 207(d)(2) of the bill merely directed the EPA to "order the manufacturer to provide prompt notification . . . [to] purchasers of all . . . vehicles or vehicle engines included in the class or category" that the EPA found to be in noncompliance with emission standards. *See* S. Rep. 1196, *supra*, at 111. Once the purchaser received such a notice, he could have sought repair at the manufacturer's expense *only under the warranty* mandated by section 207(c) of the bill. *See id.* at 110. As in the final Act, the bill expressly limited the life of the warranty to the useful life of the vehicle or engine. *See id.* (section 207(c) or S. 4358); *see also* 42 U.S.C. § 7541(a) ("the manufacturer . . . shall warrant . . . that such vehicle or engine is . . . free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations *for its useful life*") (emphasis supplied). Thus, the Senate bill's so-called "recall" provision merely required manufacturers to *notify* purchasers of a class of vehicles of a defect, and relied on the *warranty* repair obligation—which was expressly limited in

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language and are useful only to the extent they fairly reflect congressional intent. Sometimes committee reports are not reliable guides to legislative intent, as, for example, where they contain statements that contradict the plain meaning of the statutory language or that conflict with the expressed purpose of the statute.

Jordan v. United States Dep't of Justice, 591 F.2d 753, 767 (D.C. Cir. 1978) (en banc) (footnotes omitted).

duration to the useful life of the vehicle or engine—to require the manufacturers to pay for repairs. Under this scheme, it might well have been reasonable to limit the "recall" repair obligation to include only cars and engines within their useful lives.

However, the law as finally enacted, in contrast to the Senate bill, creates an *independent* recall repair obligation in addition to the warranty obligation. Section 7541(c) of title 42 requires the manufacturer of a recalled class to submit and comply with a remedial plan for that class. Unlike the *warranty* repair obligation, which covers only failure to conform with emission standards "for [the individual vehicle or engine's] useful life," 42 U.S.C. § 7541(a), the *recall* repair obligation contains no such limitation, and can reasonably be considered to extend to all vehicles or engines in the recall class. Thus, the passage from the Senate report explains an earlier version of section 207, which is irrelevant to the final version of the Act for the purposes of determining the scope of the recall repair obligation. We decline to overrule an otherwise reasonable agency interpretation on such an attenuated basis.

The EPA's rule also furthers the purposes of the Congress. The Clean Air Act's unequivocal directive is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The May 30 rule obviously effectuates this purpose. When the EPA discovers a defect that results in excessive pollution in a class of cars or engines, the rule assures that the manufacturer must fashion a remedy to fit the violation: the remedial plan must include "all properly used and maintained nonconforming vehicles in the subject class regardless of their age or mileage at the time of repair." 45 Fed. Reg. 36,397 (May 30, 1980).

This interpretation makes good practical sense because, no matter what their age at the time of actual recall, nonconforming cars have been riding the roads in violation of pollution standards. Before the EPA institutes a recall, it must make a determination that the members of the recall class have generally exceeded emission standards during their useful lives. *See* 42 U.S.C. § 7541(c)(1). The agency therefore may reasonably require manufacturers to include older cars and engines in their plans to "remedy the nonconformity" of the class. Cars and engines that failed to conform with emission standards during their useful lives do not cease to be a pollution hazard thereafter; in fact, it is sensible to presume that they are more likely to be a hazard afterward than conforming cars and engines.[14] To the degree that the members of a nonconforming class can be repaired to decrease their pollution potential even after their useful lives have expired, the public is benefitted. By the same token, to the degree that they elude correction both

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[14] The dissent maintains that Congress "clearly intended to avoid" the prospect that "ten-year old vehicles would be required to conform" with the emission standards. *See* Diss. Op. at 15 & n.40. However, such "ten-year old vehicles" are vehicles that were not in conformity with the emission standards *during* their lives, and accordingly they should not be excluded from the recall of the class of which they are members. *See supra* at pp. 12-14.

Moreover, the dissent's own proposed alternative would entail the repair of "ten-year old vehicles." The dissent would prefer that the EPA order the manufacturer to repair only vehicles and engines that were within their useful lives at the time the EPA issues its notice of nonconformity. *See* Diss. Op. at 15 n.40; *id.* at 20-21. Under this proposal, however, manufacturers would also be required to remedy overage cars and engines at their own expense. If the administrative process and subsequent appeals took five years or more, *as it has in this very case*, the manufacturers would be required to "remedy decade-old cars at their own expense." Diss. Op. at 15 n.40. How, then, can the dissent maintain that such a result is contrary to clear congressional intent?

during and beyond their useful lives, the public is cheated.[15] We therefore do not believe that older members of a recall class must be granted an exemption from plans for the remedy of a classwide defect simply because of their age or mileage at the time the recall is initiated or implemented, especially when, under such an interpretation, the number of cars and engines escaping repair could be increased as a result of manufacturer or administrative delays in getting the recall underway.[16]

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[15] The EPA explained with specificity the purposes of section 207 when it promulgated the interpretative rule and warned that those purposes could be undermined in the absence of the rule:

> The recall program has two objectives: 1) To assure that manufacturers repair vehicles which are exceeding the emission standards if maintained and used and the non-conformity occurs within the useful life of the vehicles, and 2) to encourage manufacturers to build durable emission-related components to assure that vehicles will not manifest excessive emissions during their useful lives. Both of these objectives are frustrated by an interpretation of useful life which limits manufacturers' liability only to vehicles which are within their useful life at the time of repair.

45 Fed. Reg. at 36,397. As this court stressed only recently, "[w]e cannot interpret section 207 'in a manner which runs counter to the broad goals which Congress intended it to effectuate.'" Chrysler Corp. v. EPA, 631 F.2d at 888 (quoting FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968)).

[16] As the EPA emphasized when issuing the interpretative rule, "interpreting section 207(c)(1) as imposing a useful life limitation on vehicles eligible for repair under a remedial plan could severely limit the number of nonconforming vehicles repaired pursuant to recall orders, could seriously impact ambient air quality, and would frustrate the intent of Congress." 45 Fed. Reg. 36,398.

The dissent argues that the EPA could have devised an alternative administrative scheme, using its legislative rulemaking powers, to "toll" the useful life of vehicles either at the time the EPA initiates the recall or during any period of delay that could be attributed to manufacturer failure to

IV. Conclusion

For the reasons stated above, we hold that the EPA's May 30 rule is an interpretative rule. This rule enjoys adequate support in the language, purpose and legislative history of the Clean Air Act. GM's petitions are therefore denied.

So ordered.

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comply in a timely manner with its statutory or regulatory obligations. *See* Diss. Op. at 21-22. Under such a scheme, only those cars within their useful lives at the time of the initial EPA notice of recall would be repaired at the manufacturer's expense. However, under the scheme, manufacturers could not cause attrition in the class size by engaging in dilatory tactics.

We decline to enter into the inquiry of which regulatory scheme would best balance all the interests in this field. Our task here is merely to determine whether the agency's interpretation is "sufficiently reasonable," and we conclude that it certainly is. *See* FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981). Regardless of whether such interpretations as the dissent suggests would be permissible—an issue we need not reach today—they are in fact not the interpretation that has been adopted by the agency. Moreover, courts should pay special deference to an agency's interpretation when, as here, (a) the agency is interpreting a statute it is charged with administering, (b) the interpretation has been consistently adhered to, (c) Congress has acquiesced to the administrative interpretation, and (d) the statute gives the agency substantial discretion in administering and designing an enforcement scheme. *See* National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 166-69 (D.C. Cir. 1982).

BAZELON, *Senior Circuit Judge*, with whom TAMM and WILKEY, *Circuit Judges*, join, *dissenting*: The interpretative rule upheld by the court today enjoys the virtues of simplicity, administerability, and apparent congruence with powerfully attractive ideals of public policy.[1] Regrettably, however, it suffers from the vices of administrative overreaching and a marked *in*congruence with the language and history of the statute it purports to interpret. Because the "principal dispute relates to the meaning of the statutory term" and "does not significantly engage the agency's expertise," [2] and because the EPA in this case promulgated an interpretative rule with far-reaching implications for the fair administration of the Clean Air Act without sufficient statutory grounds for so doing, I am troubled by the majority's extreme deference to the EPA's actions. Therefore, I respectfully dissent.

I. "USEFUL LIFE" AND THE LIMITS OF INTERPRETATION

A. *The Standard of Review*

We are called upon in this case to review an *interpretative*, not a *legislative* rule.[3] The distinction between the

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[1] Through the Clean Air Act, Congress sought "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . . ." Clean Air Act § 101(b)(1), 42 U.S.C. § 7401(b)(1) (Supp. V 1981) [hereinafter cited as the Act].

[2] Wilderness Soc'y v. Morton, 479 F.2d 842, 866 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973) (quoting Barlow v. Collins, 397 U.S. 159, 166 (1970); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

[3] From the outset, as the majority notes, EPA characterized the rule as "interpretive." *See* 45 Fed. Reg. 36,396 (May 30, 1980); Majority opinion at 7, 8 [hereinafter cited as Maj. op.]. For the reasons cited by the majority opinion and based upon those same authorities, I agree. *Id.*

two can be of great moment, since one of the distinguishing features of an interpretative rule is its lack of binding force upon courts; such rules are always subject to challenge in later judicial proceedings.[4] Even though courts often properly defer to an agency's interpretation of a statute for which it has been assigned enforcement responsibility, a court clearly has the power to substitute its judgment for that of the agency in the case of an interpretative rule.[5] But "neither this court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress."[6] I fear that in this instance the EPA has done precisely that.

The Supreme Court has pointed out that "[o]rdinarily, administrative interpretations are given important but not controlling significance."[7] The precise weight to be accorded an interpretative rule promulgated by an agency "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power

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[4] *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) ("[A] court is not required to give effect to an interpretative regulation."); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979); Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.24, 1154 n.26 (D.C. Cir. 1977); Gibson Wine Co. v. Snyder, 194 F.2d 329, 331-32 (D.C. Cir. 1952); *see generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7:8, 7:13 (2d ed. 1979 & Supp. 1982).

[5] *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); 2 K. DAVIS, *supra*, at § 7:8, 7:13.

[6] Alabama Power Co. v. Costle, 636 F.2d 323, 365 (D.C. Cir. 1979).

[7] *Batterton*, 432 U.S. at 424.

to persuade, if lacking power to control." [8] A court must consider "such factors as the timing and consistency of the agency's position and the nature of its expertise." [9]

The EPA rule does not "receive high marks when judged by [these] standards . . . ." [10] The rule was not a contemporaneous interpretation of the Clean Air Act, and there is no evidence that it reflects a longstanding interpretation of the Act by the agency.[11] Nor, in my view, did the rule "simply restate[] the consistent practice of the agency in conducting recalls pursuant to section 207(c)"—a proposition upon which the majority places substantial weight.[12] Finally—and this point can

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[8] *General Elec. Co.*, 429 U.S. at 142 (quoting *Skidmore*, 323 U.S. at 140).

[9] *Batterton*, 432 U.S. at 424 n.9.

[10] *General Elec. Co.*, 429 U.S. at 143.

[11] EPA argues, and the majority agrees, that its interpretation is "longstanding." Maj. op. at 11 n.7. Yet, with the exception of the dispute with GM leading to the promulgation of the May 30 rule, the agency can point to only one controversy, a Chrysler recall in 1979, during which the "useful life" issue arose. *See* EPA Brief at 5 & n.5. In that case, by EPA's own admission, the agency did not press the issue with Chrysler, because the question of nonconformity was itself being litigated. *See id.* Thus, even assuming that a lifespan barely exceeding one year suffices to render an interpretation longstanding, it would appear that the public was never placed on notice with respect to EPA's interpretation. To the extent to which the Supreme Court has required that courts scrutinize the timing of an agency's interpretative rulemaking, EPA's promulgation of the May 30 rule while in the heat of regulatory battle with GM deserves close and critical attention.

[12] Maj. op. at 8; *see also id.* at 3; 8 n.7; 17 n.12. This conclusion lacks sufficient specific support in the record. Outside of the instant dispute, as noted *supra*, the EPA can point to only the Chrysler recall in February 1979, and there the useful life issue was conceded by the EPA. *See* EPA Brief at 5 & n.5. Thus, in the only two specific instances in which the useful life limitations were at issue, the EPA ultimately ac-

scarcely be overemphasized—the interpretative rule at issue in this case does not involve the kind of fact-intensive questions concerning which great deference need be given the agency's technical expertise; rather, as the

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ceded to the limitation in the Chrysler recall, choosing for the first time to contest the limitation in this present Cadillac recall.

The majority also speculates that the EPA's practice must have been consistent because the "manufacturers have not conditioned a vehicle's eligibility for recall repair . . . on the basis of the vehicle's age or mileage." Maj. op. at 9 n.7 (citing 45 Fed. Reg. at 36,397). The record simply fails to substantiate directly that the manufacturers' behavior was the result of the imposition of the EPA's practice. The majority's speculation in fact appears to presume that manufacturers (1) somehow foresaw EPA's heretofore unannounced interpretation of their liability for repair of vehicles beyond their useful lives; (2) conceded the "reasonableness" of EPA's position; and (3) therefore, "voluntarily" included older vehicles in their remedial plans, refraining from challenging this manifestly "reasonable" interpretation.

A more plausible explanation suggests itself. With the exception of the Chrysler and Cadillac recalls in which the useful life disputes did arise, virtually all completed emission recalls have involved vehicle classes less than three years of age at the time of owner notification of nonconformity by the manufacturer. *See* J.A. 278-96. The owner response rates drop substantially for vehicles more than four years old. *See id.* at 298. This information forms a strong basis for the inference that both the EPA and manufacturers in previous recalls have failed to raise the question of liability for repair of cars beyond their useful lives because the involvement of such vehicles in the recalls has been *de minimis*. It would not have been economical for manufacturers to have expended the resources necessary to identify those vehicles beyond their useful lives or to risk owner alienation by refusing to repair the small percentage of older cars which might have found their ways to dealerships in response to a recall.

When the "six out of fifteen recalls described in detail in the record" and cited by the majority, Maj. op. at 9 n.7, are closely examined, this conclusion is reinforced. The percentages relied upon neglect the fact, for example, that the recalls of 1975 and 1976 Pontiacs, 1975 Fords, and 1974 AMCs in-

agency itself concedes. "[s]ince the rule simply expresses an interpretation of the law based on the language, legislative history and policy of the Clean Air Act, no factual data need be analyzed or commented

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volved vehicles that were part of a much larger (and younger) recall class; that the AMC recall was complicated by the more stringent emissions standards applicable uniquely to vehicles sold in California; that the manufacturers included older vehicles voluntarily; that owner responses to recalls drop dramatically with the age of the vehicle; and that the idiosyncracies of particular recalls and of negotiations between EPA and manufacturers on a case-by-case basis render the statistics relied upon by the majority unrepresentative and misleading. *See* J.A. at 278-96.

For example, the majority writes that "in 1978 the EPA began a recall that included 1974 AMC cars sold in California, approximately *56%* of which were beyond their useful lives." Maj. op. at 9 n.7 (emphasis in original). A close look at the facts of that recall, however, is illuminating. EPA ordered the recall of all 1976 AMC cars in May 1978. At that point, the model was approximately two-and-a-half years old and fewer than 20% of the vehicles could have been expected to have exceeded their useful lives. We are told that AMC "indicate[d] it [would] include 1974, 1975, and 1976 AMC cars sold in California in its plan." J.A. 291. The exact motive for this inclusion is not disclosed by the record, but it is clear that AMC included these vehicles voluntarily, perhaps out of a concern for their ability to meet more stringent California state emissions requirements. However, the majority points to the 1974 AMCs included in this recall as evidence of a class involving large numbers of cars beyond their useful lives for which the manufacturers did not impose a five year or 50,000 mile limitation. I would suggest, with respect, that such use of data is inappropriate because (1) only *California* vehicles from the 1974 and 1975 AMC model-years were included in the recall, thus making them a relatively small proportion of the recall class which was overwhelmingly composed of 1976 AMCs, and (2) these vehicles were included *voluntarily*, thus indicating the manufacturer's willingness to go beyond EPA's requirements.

The majority's reliance upon a few other recalls involving some percentage of olders cars is similarly misplaced, but no constructive purpose would be served by here disputing the

on." [13] Consequently, although some deference is to be accorded the May 30 rule, our inquiry must focus on whether EPA's interpretation is reasonable and supportable in light of the statutory language and legislative history. And our final determination should reflect, if required by that language and history, the Supreme Court's reminder that "[a] court is not required to give effect to an interpretative regulation." [14]

B. *Statutory Language*

In reviewing an agency's interpretation of a statute, a court should first examine the language of that statute to determine whether the interpretation falls within the

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numbers offered by the majority or by enumerating the special circumstances involved in each case. The fact remains that nine of the fifteen recalls involved no older vehicles, J.A. at 278-96, and that only the Chrysler and Cadillac recalls meaningfully presented the useful life issue, an issue which, in the Chrysler case, was not pursued by EPA. *See supra* note 11. Such a history hardly "constitutes a longstanding administrative policy." Maj. op. at 11 n.7.

Judicial deference to an agency's "consistent" interpretation should not be based on the fact that the issue at stake simply has not previously arisen. Such deference is appropriate if an administrative interpretation has been consistently asserted in the face of a long series of challenges, *see, e.g.*, Esquire, Inc. v. Ringer, 591 F.2d 796, 801 (D.C. Cir. 1978), or if the policy had been publicly announced and implemented for a long time, *see, e.g.*, DeLano v. United States, 393 F.2d 517, 521-22 (Ct. Cl. 1968). In the instant case, however, the EPA has previously announced its position only once and, in that instance, "did not proceed" on behalf of that position. EPA Brief at 5 n.5. We are pointed to no other occasion on which the EPA *affirmatively required* manufacturers to include vehicles beyond their useful lives in their remedial plans; the issue simply was never raised by either party.

[13] EPA Brief at 41.

[14] *Batterton*, 432 U.S. at 425 n.9.

statute's plain meaning.[15] Section 207(c) of the Clean Air Act reads in relevant part as follows:

> If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title [emissions standards] when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer.[16]

The majority relies upon "this class-based orientation of section 207(c)(1)" in concluding that "the EPA reasonably mandated that remedial plans be designed to cover all members of a recall class," regardless of the age or mileage of any individual vehicle at the time it is brought in for repair, "if (1) a substantial number of cars within a given class exhibited nonconformity during their useful lives, and (2) the car is a member of that class."[17] GM focuses instead upon the concept of nonconformity, arguing essentially that although classes of vehicles can be recalled, and remedial plans can be prepared on a class-wide basis, a manufacturer can be liable

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[15] *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Caminetti v. United States, 242 U.S. 470, 485 (1917); Symons v. Chrysler Corp. Loan Guarantee Bd., 670 F.2d 238, 241 (D.C. Cir. 1981); Higgins v. Marshall, 584 F.2d 1035, 1037 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 931 (1979).

[16] *As amended*, 42 U.S.C. § 7541(c)(1) (Supp. V 1981).

[17] Maj. op. at 13.

to "remedy" only those nonconforming members of a recall class that are within their useful lives at the time of repair.[18] Each of these approaches to the statute has a superficial appeal, but neither constitutes a "sufficiently reasonable" interpretation of the legislation to which this court must look for guidance.[19]

To some extent, of course, the plain language of a statute and the legislative history which resulted in that language are inextricable;[20] but even a casual reader of the Clean Air Act's text, without reference to legislative intent, could not help but be struck by the significance of the concept of "useful life." At the outset, the Act makes clear that emissions standards prescribed by the Administrator are applicable to the vehicles throughout their "useful lives."[21] It explicitly defines the useful life of automobiles as "a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs . . . ."[22] In the recall and remedy provision at the heart of the instant controversy, the statute not only refers to "useful life" but directs readers to the statutory definition of the term by section number.[23] Moreover, without resort to the term or definition, the Act utilizes the five year or fifty thousand mile "useful life" concept in no fewer than four different statutory enforce-

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[18] GM Brief at 20, 23-26; Petitioner's Supplemental Brief on Rehearing En Banc, April 12, 1984 at 5 [hereinafter cited as GM Supp. Br.] ("Because no emissions standard applies to a vehicle beyond 5 years or 50,000 miles, there can be no nonconformity which the manufacturer can be required to remedy under § 207(c)(1)."); *see* Maj. op. at 13.

[19] *See* FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981).

[20] The legislative history is explored *infra* pp. 11-19.

[21] 42 U.S.C. § 7521(a)(1) (Supp. V 1981).

[22] 42 U.S.C. § 7521(d)(1) (Supp. V 1981).

[23] 42 U.S.C. § 7521(c)(1) (Supp. V 1981); *see supra* note 16 and accompanying text.

ment provisions.[24] To interpret section 207(c) in such a way as to eliminate, for all practical purposes, any "useful life" limitation on the EPA's authority to require manufacturers to remedy nonconforming vehicles, would be manifestly unreasonable, an evident attempt to circumvent the plain meaning of the statutory language. Yet, it is precisely such an interpretation that the majority today condones, emphasizing that the question presented by this case "is not settled by the definition of 'useful life'; it turns on the intended scope and purpose of the recall provision." [25]

But if defining the concept of "useful life" cannot *settle* this question, neither will minimizing that concept's obvious importance contribute to the correct resolution of this case. Indeed, it is likely that the "intended scope and purpose of the recall provision" can only be arrived

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[24] For example:

1. Section 206(a) requires EPA to certify, on the basis of extensive testing of prototypes, that each new vehicle produced will conform to emissions standards for five years or 50,000 miles. No manufacturer may produce or market vehicles not covered by such a certificate. 42 U.S.C. § 7525(a) (Supp. V 1981).

2. Section 206(b) authorizes the EPA to conduct production line testing to determine whether vehicles being manufactured will conform to emissions standards for 50,000 miles. Suspension of the certificate of conformity is authorized if vehicles fail such tests. 42 U.S.C. § 7525(b) (Supp. V 1981).

3. Section 207(a) requires a manufacturer to warrant that each vehicle sold is designed and built to conform to emissions standards and that its materials and workmanship are free from any defect which will cause it to fail to conform to emissions standards during its useful life. 42 U.S.C. § 7541(a) (Supp. V 1981).

4. Section 207(b) further requires a manufacturer to warrant that performance of major emissions components of each vehicle will conform to emissions standards for five years or 50,000 miles. 42 U.S.C. § 7541(b) (Supp. V 1981).

[25] Maj. op. at 13.

at and fully appreciated by attempting to define, understand, and reasonably apply that critical statutory term. A good place to begin is with the argument urged upon this court by GM, the bulk of which the majority properly rejects.

In asserting that "the statute does not authorize EPA to order recall and repair of vehicles beyond their useful lives, ignoring their age and mileage at the time of repair," [26] GM confusingly intermingles the EPA's authority "to order recall and repair" of vehicles with its own duty to perform any necessary repair, implying that the time and mileage parameters of "useful life" are somehow to be applied "at the time of repair." There is no support for such an interpretation in the statutory language. Indeed, that language suggests, if anything, that the definition of useful life applies when "the Administrator determines" that a nonconformity exists and notifies the manufacturer "immediately." [27] In addition,

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[26] GM Supp. Br. at 5.

[27] GM essentially ignores the language of section 207(c) itself, which plainly invokes the "useful life" concept in connection with the EPA's pre-notice determination of nonconformity. The company argues instead that vehicles beyond their useful lives when brought in for repair cannot be, at that time, "nonconforming," since emissions standards can only apply to vehicles during their useful lives. GM Brief at 19-20, 23-26. If accepted as a reasonable interpretation of the statute, EPA would be required, before issuing a notice of nonconformity to a manufacturer, to estimate and take into account potentially long lag times between that notice and the date that the entire class of vehicles would be brought in for inspection and repair. In practical administrative terms, the five year element of "useful life" might mean 4½ years in some cases, two years or less in others. Section 207(c) would become an uncertain and inconsistent mechanism at best, a nullity at worst. Reading the statute, instead, to mean what it plainly seems to mean—*i.e.*, that a manufacturer must recall and repair vehicles that are within their useful lives at the time that the agency's notice of nonconformity first issues—would be at once administerable and reasonable. *See infra* pp. 21-22.

to accept GM's interpretation would be, in practice, to undercut the central point of section 207(c), even as to accept EPA's and the majority's interpretation would be to destroy its explicitly delineated outer boundaries. If the nonconformity of a class of vehicles were discovered relatively late in a vehicle's useful life, or if protracted negotiations, litigation, and appeals combined to place all or most vehicles involved in a recall beyond their useful lives by the time members of the recall class were brought in for necessary service, GM's interpretation could regularly, even totally, frustrate the purpose of the recall provision. On the other hand, the interpretation offered by the EPA and accepted by the majority flies just as surely in the face of the statute's plain meaning and similarly frustrates the intent of Congress. Somewhere between these two extreme readings of the statutory language, the path of reasonableness lies.

C. *The Legislative History*

Even where, as here, the statutory language appears clear, the plain meaning rule is only a primary and not a conclusive source of understanding and must yield on occasion to other indicia of legislative intent, including legislative history.[28] The majority rightly looks to such history for guidance, but looks, I believe, in the wrong places and with the wrong emphasis. The crucial point to be made about the recall provision is not that Congress intended it to apply to a "model" or "class" or "category" of vehicles or engines, but that it intended any delineation of a "given model run" or an "entire lot" to

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[28] *See* Chesapeake & Ohio Ry. Co. v. United States, 571 F.2d 1190, 1194 (D.C. Cir. 1977); *see also* Watt v. Alaska, 451 U.S. 259, 266 & n.9 (1981); Aaron v. SEC, 446 U.S. 680, 705-08 (1980) (Blackmun, J., concurring in part and dissenting in part).

depend upon its deliberately created concept of "useful life." [29]

If little else is crystal clear from the complex legislative history of the Clean Air Act, one thing is: despite evidence that the actual life of an automobile is closer to ten years or one hundred thousand miles than it is to five years or fifty thousand miles, Congress *intentionally limited* the duration of a manufacturer's *liability* for a vehicle's nonconformity with emissions standards to a five-year/fifty-thousand mile period. For example, Senator Muskie, one of the bill's prime sponsors, remarked that "[f]ifty thousand miles is not all their life, 100,000 miles being nearer to a measure of the life of a motor vehicle, but we have taken 50,000 miles." [30] During the debate on the 1977 Clean Air Act Amendments, Senator Muskie reemphasized this conscious choice:

> The actual life of a car is more than 50,000 miles. We all know that. It approaches 100,000 miles, I think, increasingly, but it was our feeling that a 50,000-mile warranty would put sufficient pressure on the manufacturers to meet the standards so that if they met them for 50,000 miles, the chances were that the standards would be met pretty closely . . . even . . . beyond 50,000 miles.[31]

The considerations underlying the "useful life" limitations were equally straightforward. As the Senate Committee Report noted in 1970:

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[29] The majority devotes much effort to establishing that recalls must be class-wide, but sheds no light on the role of "useful life" in defining the "class" to be recalled. *See* Maj. op. at 12-14.

[30] 116 CONG. REC. 33,094 (1970), *reprinted in* 1 SENATE COMM. ON PUB. WORKS, 93rd CONG., 2d SESS., A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 430 (1974) [hereinafter cited as *1970 Legislative History*].

[31] 122 CONG. REC. 24,302 (1976), *reprinted in* 6 SENATE COMM. ON ENVIRONMENT & PUB. WORKS, 95th CONG., 2d SESS., A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1977, at 5145 (1978).

> The manufacturers informed the Committee that they would not be able to guarantee conformity with emissions standards for the anticipated 10-year life of a vehicle. The committee bill provides that 50,000 miles would be the maximum that a vehicle would be required to conform to the standards for which it was certified.[32]

Where Congress has so explicitly and deliberately considered, and then rejected, a more expansive requirement than that ultimately enacted, it is not for the agency to exceed the statutory limits under the guise of "interpretation."[33]

Nevertheless, the majority argues at considerable length that some of the 1970 legislative history is "irrelevant" because

> the law as finally enacted, in contrast to the Senate bill, creates an *independent* recall repair obligation in addition to the warranty obligation. Section 7541 (c) of title 42 requires the manufacturer of a recalled class to submit and comply with a remedial plan for that class. Unlike the *warranty* repair obligation, which covers only failure to conform with emission standards "for [the individual vehicle or engine's] useful life," 42 U.S.C. § 7541(a), the *recall* repair obligation contains no such limitation,

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[32] S. REP. No. 1196, 91st Cong., 2d Sess. 30 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 30, at 430.

[33] The Supreme Court has recently reaffirmed that "[w]hen a court reviews an agency's construction of the statute which it administers, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." This is so because "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron U.S.A. v. Natural Res. Ref. Council, 52 U.S.L.W. 4845, 4847 & n.9 (U.S. June 26, 1984).

> and can reasonably be considered to extend to all vehicles or engines in the recall class.[34]

With respect, such exertions in response to GM's reliance upon a particular passage from a committee report hardly seems worth the candle.[35] Ultimately, the majority's dismissal of the Senate Committee Report rests on the dubious assumption that the Conference Committee, without comment or explanation, added to the recall provision of the Senate bill an "independent" recall repair obligation in addition to the warranty obligation. Any such new recall repair obligation, however, would expose the manufacturer to liability for repair virtually indefinitely, in dramatic (and unexplained) contrast to the warranty repair obligation, which limited the manufacturer's liability for repair to a vehicle's useful life. Unlike the majority, I do not see, try as I might, how the recall repair obligation "can reasonably be extended" so far.[36]

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[34] Maj. op. at 20 (emphasis in original).

[35] *See* Maj. op. at 18. I do not find this particular passage either as ambiguous as the majority appears to believe or as dispositive as GM claims on the issue of congressional intent. Most importantly, I find it completely consistent with "the plain meaning of the statutory language" and "the expressed purpose of the statute" insofar as it reinforces the evident desire of Congress to place some reasonable limitation upon the liability of manufacturers. *See id.* at 15 n.10; Jordan v. Department of Justice, 591 F.2d 753, 767 (D.C. Cir. 1978) (en banc) (footnotes omitted).

[36] At one point the majority appears to modify its own "classwide" analysis, arguing that "[t]here is, at the very least, this definite time limitation on the Administrator: he must conclude his testing before the entire recall class has exceeded five years of age." Maj. op. at 14 n.9. While I agree that this would be a slightly more reasonable interpretation of the EPA's statutory authority, it is not the authority asserted by the EPA in this case, and no hint of such a limitation is contained in the plain language of the interpretative rule, the validity of which is here at issue. Additionally, it

To appreciate how *un*reasonable such an interpretation would be, it is important to bear in mind that a recall class may include vehicles or engines of more than one model year. For example, the same carburetor or engine component may be used in vehicles over the course of four or five model years.[37] Under the interpretation espoused by EPA and the majority, the manufacturer would be liable for the repair of all vehicles ever produced with that component, provided a sample of defective vehicles or engines still within their useful lives could be assembled for testing.[38] If the processes of the initial EPA investigation and of approving a remedial plan were to require as much time as they did in the present case, that liability would be extended even further.[39] And taking the process of owner notification into account, compounded not infrequently by appeals to the agency or the courts, manufacturers could and certainly would be compelled to remedy at their own expense the "nonconformity" of vehicles that were more than a dec-

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does not avoid the unreasonable result illustated *infra* notes 37-41 and accompanying text.

[37] *See, e.g.*, J.A. 293 (recall of 1975-1978 Pontiacs with EGR back pressure transducers).

[38] Thus, if the Pontiac engine defect, *supra*, for instance, had been discovered during the fourth year of the useful lives of the 1978 model Pontiacs, *all* Pontiacs manufactured with the suspect transducer would be subject to recall. The manufacturer would have been required to repair not only the four-year old 1978 but also the 1975 Pontiacs, which, at the time the EPA would have issued its notification of nonconformity, would have been between nine and ten years old.

[39] Months may be consumed in testing and investigating a potentially nonconforming class prior to the issuance of a recall order. EPA approximates the average time spent in such investigations as nine months. *See* J.A. 268 & n.5. In this case the EPA investigation began in May 1975, issued its notice of nonconformity in March 1977, and negotiated the details of GM's remedial plan through December 1979. *See* J.A. 1, 123, 137, 142, 145, 170, 182, 203, 224, 226, 230, 236, 247, 252.

ade old.[40] The emissions standards to which those ten-year old vehicles would be required to conform, moreover, would be standards that Congress explicitly intended to apply exclusively to vehicles half that age or younger.[41]

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[40] EPA estimates that the "average time from recall order to owner notification is 8½ months." EPA Brief at 28 n.33; J.A. 268 & n.6. As to appeals, EPA found "the recall of certain 1975 Chryslers ordered recalled on December 8, 1976" to be "[o]f particular note":

> Although the recall was ordered relatively early in the life of the vehicles, Chrysler requested an administrative hearing on the Administrator's determination of nonconformity. The Administrative Law Judge upheld the determination in a decision filed on February 10, 1978. Subsequent appeals to the Administrator and this Court also resulted in decisions favorable to EPA. *Chrysler Corp. v. EPA*, [631 F.2d 865 (D.C. Cir. 1980)] . . . . Certiorari was denied by the U.S. Supreme Court on December 1, 1980 . . . , when few, if any, of the 208,000 vehicles subject to the recall order were still within their useful lives.

EPA Brief at 28 n.35.

[41] If the EPA and this court had interpreted the statute to require the manufacturer to recall and bring into conformity with "useful life" standards all cars which were within their useful lives *at the time the notice of nonconformity issued* to manufacturers, or even on the date the manufacturer and EPA agreed on an appropriate remedial plan, that interpretation would, I believe, have been a reasonable one. This is so even though, as developed *infra* note 58 and accompanying text, such an interpretation might require *some* vehicles to be brought into conformity with such standards despite their having exceeded their useful lives *at the time of repair*. By limiting, *ab initio*, the recall authority to the class of vehicles within their useful lives at the time the nonconformity is first established by the agency and communicated to the manufacturer, the agency would have been acting, in my opinion, within its reasonable discretion under the statute. *See infra* pp. 21-23.

Taken on its face, however, the EPA rule simply goes too far, and does raise the specter of a manufacturer being required to remedy decade-old cars at its own expense, a result that Congress clearly intended to avoid. The EPA

One would have expected such a drastic extension of the manufacturer's repair obligation to have attracted at least some debate. Certainly there were those in the Senate who believed even the limited five-year liability imposed by the warranty provision to have been excessive.[42] Particularly in the House, where the original bill to amend the Clean Air Act contained neither a recall nor a warranty repair obligation, some comment on such a sweeping new imposition of repair liability would surely have arisen.[43] Yet, no such comment was made

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attempted at oral argument to salvage the rule from this conspicuous defect by asserting that the agency will not in fact require such vehicles to be brought into compliance with inapplicable standards but will instead require the same "repair" to be made on older and younger vehicles. The difficulty with this approach is that the Act requires not that a "repair" be performed but that a nonconformity be remedied.

Similarly, the majority's attempt to save this interpretative rule by reading a modest limitation into its facially limitless language, Maj. op. at 14 n.9, ought to be unavailing. Even if the recall action in this case can and should be upheld, *see infra* at p. 25, the rule itself, as promulgated, is clearly and unambiguously contrary to the statute's language and history.

Under our cases, if the agency wishes to fill in interstices created by a possible congressional failure to anticipate all the possible consequences of the statutory scheme, the proper recourse is a legislative, not an interpretative rule. *See* Chamber of Commerce v. OSHA, 636 F.2d 464, 469-70 (D.C. Cir. 1980).

[42] *See, e.g.*, 116 CONG. REC. 33,083, 33,093 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 29, at 307-08, 330-31 (remarks of Senator Griffin); *id.* at 33,097, *reprinted in* 1 *1970 Legislative History*, *supra* note 29 at 338 (remarks of Senator Cooper); *see also* Administration's Letter to Conference Committee Recommending Certain Provisions (Nov. 17, 1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 29, at 212-13 (expressing view of executive branch that 50,000-mile warranty was "inappropriate and unrealistic in the light of known technology and experience").

[43] *See* H.R. REP. No. 1146, 91st Cong., 2d Sess. 11-13, 38-40 (1970).

during either the House or the Senate debates on the Conference Committee Report; instead, the only discussion of amendments to § 207 of the Act focused exclusively on the House's acquiesence in the Senate's proposed *warranty* repair obligation, which as the majority admits, was limited to the five-year/50,000-mile useful life of the recalled vehicle.[44]

My own reading of the legislative history leads me to conclude that any alterations made in the Senate bill by the Conference Committee were merely "technical, clarifying, and conforming changes,"[45] and that the warranty repair obligation and the recall repair obligation are essentially coterminous.[46] Although they do differ in their triggering agents—the individual consumer in the case of warranty repairs or the agency in the case of recalls—both obligations are limited in duration to the five years or 50,000 miles of a vehicle's useful life.

If this reading of the legislative history (and, as demonstrated earlier, of the plain meaning of the statutory

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[44] *See* 116 CONG. REC. 42,520 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 29, at 112 (House debate) (remarks of Representative Staggers); *id.* at 42,382, 42,385, *reprinted in* 1 *1970 Legislative History*, *supra* note 29, at 126, 134-35 (Senate debate) (remarks of Senator Muskie).

[45] H.R. REP. No. 1783, 91st Cong., 2d Sess. 42 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 29, at 192. No mention of any extension of a manufacturer's liability for repair of nonconforming vehicles beyond the five-year/50,000-mile limits of the warranty period is made anywhere in the Conference Committee Report.

[46] As the Supreme Court has recently reaffirmed in another context: "Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history." Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., 52 U.S.L.W. 4943, 4948 (U.S. June 26, 1984) (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 72 n.6 (1982)).

language with which the history is thoroughly consistent, is correct, just one task remains: the determination of the precise point in the recall process at which the all-important "useful life" limitation should apply. That determination, of course, is for the agency, so long as its action is "sufficiently reasonable." [47] In this case, the majority concludes that "it certainly is." [48] Reluctantly, as sympathetic as I am with the EPA's chafing at the bit of its statutory authority in promulgating the instant rule, I cannot agree.[49]

II. The Reasonableness Inquiry

A. *The Language of the May 30 Rule and its Implications*

By requiring "manufacturers to submit a plan to remedy all vehicles within the class or category of vehicles subject to an ordered recall which experienced the nonconformity during their useful lives regardless of their age or mileage at the time of repair," [50] the agency did at least use the *words* "useful life." But it did so in such a way as, in practice, to read the useful life limitation out of the statute. As the foregoing discussion has demonstrated, Congress clearly contemplated some increase in a car's emissions once a vehicle has surpassed its useful life. Correspondingly, and just as clearly, Congress provided for a limitation on a manufacturer's ob-

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[47] FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981).

[48] Maj. op. at 23 n.16.

[49] Nor can I agree, as noted *supra* pp. 10-11, with the interpretation of the recall provision offered by GM. As this opinion goes on to suggest, EPA's enforcement authority need not be constrained significantly, if at all, by my reading of the Clean Air Act's recall provisions. *See infra* pp. 21-25.

[50] 45 Fed. Reg. 36,396-97 (May 30, 1980) (presently codified at 40 C.F.R. § 85.1803, App. A to subpart S (1982)).

ligation to recall and repair nonconforming cars that had exceeded their useful lives. The question presented by this case is thus whether, as the majority asserts, the recall repair obligation "can reasonably be considered to extend to all vehicles or engines in the recall class" [51] which, in the language of the rule, "experienced the nonconformity during their useful lives." To my mind, what is unreasonable about the EPA rule is not that some vehicles may be compulsorily repaired at a manufacturer's expense "regardless of their age or mileage at the time of repair" (GM's position), but that in many cases a manufacturer will be unable reasonably to determine whether a particular vehicle became noncomplying during its useful life or long after.[52]

Under the May 30 rule as promulgated, whenever a car brought in for repair has exceeded its useful life, the manufacturer will be unable to demonstrate whether a present emissions excess is attributable to the sanctioned erosion of performance after 5 years or 50,000 miles, which Congress so clearly acknowledged as likely and explicitly provided for through the concept of useful life, or to a nonconformity which did in fact exist *during* the vehicle's useful life.[53] In essence, the EPA's rule establishes an absolute and irrebuttable presumption that *all* older cars were among the percentage failing to meet standards during their useful lives. In practice, the language of the statute—"If the Administrator determines that a substantial number . . . do not conform"—would be rewritten to read "did not conform" or "might not have conformed." Even if the establishment of such a presumption or the enforcement of such a construction

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[51] Maj. op. at 20.

[52] *See supra* pp. 15-16.

[53] At best, manufacturers would be forced to indulge in expensive, unwieldy, customer-alienating, fact-specific controversies concerning when a given car, beyond its useful life when presented for repair, first exhibited excessive emissions.

were within the EPA's authority, such actions go beyond mere statutory interpretation. Even if, as the majority suggests, the May 30 rule "makes good practical sense" and is "sensible" in light of the Clean Air Act's purpose, its evident disparity with the plain meaning of the statutory language and legislative history would seem to require, at a minimum, legislative rulemaking with attendant notice and comment procedures.[54]

B. *Some Reasonable Alternatives*

In concluding that the agency acted unreasonably in promulgating its May 30 interpretative rule, I wish to emphasize that the interpretation urged upon this court by GM seems to me at least equally unreasonable,[55] and that EPA could, in my view, readily remedy the defect by one of three alternative approaches.[56]

First, EPA might reword its interpretative rule in such a way as to *reasonably* interpret the language and history of the recall provision. If, for example, the rule were to provide for the recall and repair of vehicles within their useful lives *at the time the notice of non-*

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[54] Maj. op. at 21.

[55] *See supra* pp. 10-11.

[56] The majority has, in a sense, suggested a fourth. *See supra* note 36; Maj. op. at 14 n.9. In so doing, however, the majority opinion insists that "it is not the job of the courts to propose rules that they would prefer the agency to adopt." Maj. op. at 12 n.8. That is true, of course, but it is equally true, and this court has recently reemphasized, that where the adoption of a particular rule is beyond the agency's statutory authority, it is our obligation to vacate the rule in question. *Cf.* Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1451 (D.C. Cir. 1984) (Wald, J.) (little deference accorded agency's interpretation of procedural requirements, normally the area in which an agency deserves the most deference, because "Congress did not grant the Commission discretion to remove so material an issue . . . .").

conformity issued to manufacturers, the intent of Congress would be vindicated, and manufacturers would have little or no incentive to delay a valid recall by means of strategic lawyering. Quite to the contrary, any frivolous or bad-faith delay would be penalized not only by its inherent expense but by the fact that any nonconforming vehicles ultimately requiring repair would be older and, presumably, more expensive to bring into conformity with emissions standards.

The reasonableness of such an interpretative rule would be underscored by an important passage of the Act's legislative history. The comments of the House managers of the 1970 bill, included in the Conference Committee Report, explicitly state:

> The Senate [bill] . . . authorized the Administrator, if he determined that any class or category of vehicles or engines did not conform with applicable emission standards, to require manufacturers to notify purchasers of such nonconformity. *Moreover, if a manufacturer discovered such nonconformity during the term of any warranty* required under the Senate [bill], he was required to notify purchasers of the nonconformity and to remedy such nonconformity at no cost to the owner.[57]

Even as to the warranty provision, then, and *a fortiori* as to the recall provision (if, as the majority believes, there is any distinction between the two), Congress contemplated that the notion of "useful life" was to be applied at the time the manufacturer became aware of a nonconformity.[58]

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[57] H. REP. No. 1783, 91st Cong., 2d Sess. 50 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 30, at 200 (emphasis added).

[58] If, as suggested here, the manufacturer's obligation to recall and repair a nonconforming vehicle attaches at the time the agency makes a determination of nonconformity and gives notice, some cars may be beyond their useful lives by the time

A second alternative open to the agency, as noted, would be a full legislative rulemaking. If, after hearing all sides and making a record, the agency believed that the language of its May 30 rule remained justifiable, it would be sustained on judicial review unless it were found to be "arbitrary, capricious, or manifestly contrary to the statute." [59] Any rule promulgated in the wake of such full procedural safeguards would, of course, be entitled to more weight than the interpretative rule to which the majority—inappropriately, I believe—today defers.

In this context I would note, as well, that the Administrator has substantial discretion in defining by regulation the useful lives of vehicles under the Act. Section 202(d) defines the useful lives of "light duty vehicles" as "a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs . . . ." [60] The parenthetical phrase, "or the equivalent," surely authorizes the Administrator to establish, in essence, a "constructive useful life," by promulgating legislative regulations prescribing *how* the five-year/50,000 mile useful life will be measured for recall purposes. For example, a vehicle's age and mileage could be "tolled" whenever the EPA issues a recall order for vehicles of its class. Such a tolling provision would protect the recall system from manufacturer-induced delays. The majority acknowledges this possibility but "decline[s] to enter into the inquiry of which regulatory scheme would best bal-

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they are repaired. If a particular vehicle's status at the time of the determination were contested, however, its age could be easily ascertained by reference to the bill of sale, and its mileage could be rebuttably presumed to have increased uniformly throughout its period of ownership. Such a presumption would need to be resorted to only rarely, and would be reasonable under the circumstances.

[59] Chevron U.S.A. v. Natural Res. Def. Council, 52 U.S.L.W. 4845, 4847 (U.S. June 26, 1984).

[60] 42 U.S.C. § 7521(d)(1) (Supp. V 1981).

ance all the interests on this field." [61] I agree that it is the role of the agency, and not of the courts, to make such a determination. But it *is* the role of the courts to "reject administrative constructions which are contrary to clear congressional intent." [62] Especially where, as here, an agency promulgates an interpretative, rather than a legislative, rule, and where it relies not on its technical expertise but on statutory interpretation alone, the Supreme Court has made it abundantly "clear . . . that deference is not to be a device that emasculates the significance of judicial review." [63]

Finally, of course, the EPA and other advocates of a more far-reaching recall authority than that provided by Congress in the Act as amended may seek fresh congressional attention to the issues raised by this case. A more reasonable interpretative rule, crafted along the lines suggested in this opinion, may be deemed inadequate; similarly, the alternative of legislative rulemaking may prove somehow unsatisfactory. If so, those who would impose a more far-reaching burden upon automobile manufacturers to ensure the purity of our nation's air will have recourse to our nation's legislators. It may well be desirable to hold manufacturers liable to recall and repair every vehicle ever produced that may have violated emissions standards many years before in order "to compensate for the pollution caused during the time of its violation." [64] I fear, however, that in this case the majority has forgotten that "[i]t is not for an administrative agency . . . to preempt congressional action or to 'fill in' where it believes some federal action is needed." [65]

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[61] Maj. op. at 23 n.16.

[62] *Chevron*, 52 U.S.L.W. at 4847 n.9.

[63] Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., 52 U.S.L.W. 4943, 4945 (U.S. June 25, 1984).

[64] Maj. op. at 15.

[65] Office of Consumers' Counsel v. Federal Energy Regulatory Comm'n, 655 F.2d 1132, 1152 (D.C. Cir. 1980).

III. Conclusion

For the reasons discussed in this opinion, I would vacate EPA's May 30, 1980 interpretative rule. I would affirm, however, that part of the June 23, 1980 order finding that GM had failed to submit a satisfactory remedial plan with respect to certain 1975 Cadillacs within their useful lives as of March 21, 1977, the date on which the Administrator officially notified GM of the nonconformity of a substantial number of those vehicles.

APPENDIX B

EDITOR'S NOTE

PAGES B1 thru B67 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1868

GENERAL MOTORS CORPORATION,
A DELAWARE CORPORATION, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

No. 80-2027

GENERAL MOTORS CORPORATION,
A DELAWARE CORPORATION, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

No. 81-1029

GENERAL MOTORS CORPORATION,
A DELAWARE CORPORATION, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petitions for Review of an Order of the Environmental Protection Agency

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Argued January 13, 1983

Decided December 16, 1983

George F. Ball and *Theodore Souris*, with whom *William L. Weber, Jr.*, *Michael B. Lewiston*, *James A. Smith*, *Terrence B. Larkin*, and *Frederick J. Dindoffer*, were on the brief, for petitioner.

Samuel I. Gutter, Attorney, Environmental Protection Agency, with whom *Angus MacBeth*, Acting Assistant Attorney General, *Gerald K. Gleason*, Assistant General Counsel, *Robert A. Weissman*, Attorney, Environmental Protection Agency, *Donald W. Stever, Jr.*, and *Rosanne Mayer*, Attorneys, Department of Justice, were on the brief, for respondent.

Before: WILKEY and WALD, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Concurring opinion filed by *Circuit Judge* WILKEY.

Dissenting opinion filed by *Circuit Judge* WALD.

BAZELON, *Senior Circuit Judge*: Petitioner General Motors Corporation (GM) brings three consolidated petitions for review of final actions of the Environmental Protection Agency (EPA) under the Clean Air Act, as amended.[1] In these petitions we are asked to decide whether the recall provision of section 207(c)(1) of the Act[2] permits the EPA to require automobile manufac-

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[1] 42 U.S.C. §§ 7401 *et seq.* (Supp. V 1981) [hereinafter "the Act"].

[2] 42 U.S.C. § 7541(c)(1) (Supp. V 1981).

turers to recall and repair at their own expense *all* members of a class of vehicles—a substantial number of which have been found to be in nonconformity with applicable emissions standards during their useful lives—regardless of the age or mileage of any individual vehicle when presented for repair. We take jurisdiction under section 307(b)(1) of the Act.[3] For reasons detailed below, we reverse the actions of the Administrator.

BACKGROUND

Through the Clean Air Act, Congress sought "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population . . . ."[4] To this end, Title II of the Act[5] establishes a comprehensive program for the control of motor vehicle emissions. The Act authorizes the Administrator to prescribe standards for motor vehicle emissions within the broad guidelines set out by the statute.[6] Such standards are applicable to the vehicles throughout their "useful lives."[7] The useful life of light duty vehicles, such as automobiles, is defined by statute as "a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs . . . ."[8]

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[3] 42 U.S.C. § 7607(b)(1) (Supp. V 1981).

[4] Clean Air Act § 101(b)(1), 42 U.S.C. § 7401(b)(1) (Supp. V 1981).

[5] 42 U.S.C. §§ 7521-7574 (Supp. V 1981).

[6] Clean Air Amendments of 1970 § 6(a), 84 Stat. 1676, 1690 (1970) (current version at 42 U.S.C. § 7521 (Supp. V 1981)).

[7] *Id.* § 6(a)(1), 84 Stat. 1676, 1690 (1970) (current version at 42 U.S.C. § 7521(a)(1) (Supp. V 1981)).

[8] *Id.* § 6(a), 84 Stat. 1676, 1692 (1970) (current version at 42 U.S.C. § 7521(d)(1) (Supp. V 1981)).

The Act also provides an elaborate enforcement system designed to ensure that vehicles comply with emissions standards, not only when they leave the assembly line but also while in actual use.[9] Among the enforcement mechanisms at the disposal of the EPA is the authority to order manufacturers to recall and repair at their own expense an entire class or model of vehicles or engines should the Administrator determine that a substantial number of vehicles in that class, although properly used and maintained, have failed to meet applicable emissions standards during their useful lives.[10] The precise scope and application of this recall authority are at issue in this lawsuit.

In May 1975, the EPA began an investigation [11] of the emissions performance of 1975 Cadillacs of the 60V43 engine family.[12] On March 21, 1977, following a program of testing fifteen sample vehicles by both EPA and GM, the Administrator officially notified GM that he had

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[9] *Id.* § 8(a), 84 Stat. 1676, 1694-98 (1970) (current version at 42 U.S.C. §§ 7525, 7541 (Supp. V 1981)).

[10] Clean Air Act § 207(c)(1), 42 U.S.C. 7541(c)(1) (Supp. V 1981).

Other aspects of the enforcement mechanism require presale and assembly line testing and certification, *see id.* § 206, 42 U.S.C. § 7525 (Supp. V 1981), and warranties for the repair of isolated, individual vehicle failures, *see id.* § 207(a), (b), 42 U.S.C. § 7541(a), (b) (Supp. V 1981).

[11] The investigation was initiated in response to data from state emissions inspections and GM assembly line audits indicating significant hydrocarbon and carbon monoxide problems. *See* Joint Appendix (J.A.) 1.

[12] The 60V43 engine family consisted of approximately 220,000 vehicles equipped with carburetor part number 7045*230* or 7045*193* [hereinafter referred to as the 230-carburetor or 193-carburetor, respectively]. *See* EPA Brief at 5 n.6.

determined that a substantial number of 1975 Cadillacs equipped with the 230-carburetor, although properly maintained and used, failed to meet federal emissions standards during their useful lives.[13] The Administrator ordered GM to submit a plan for the recall and repair of the 230-carburetor class.[14] He also indicated that the EPA staff would continue its investigation of emissions problems in 193-carburetor Cadillacs and urged GM to recall these vehicles voluntarily.[15]

GM did not contest the finding of nonconformity and "volunteered" to recall the 193-carburetor vehicles.[16] Nevertheless, negotiations concerning GM's proposed remedial plan [17] dragged on from May 1977 until December

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[13] *See* J.A. 123. This determination was based on EPA ordered testing of 15 sample vehicles, permitting the EPA to project with 95 percent statistical confidence that at least 68 percent of the vehicles in the class were exceeding standards. *See id.* at 122-23, 125. Earlier projections estimated a 43 percent nonconformity rate. *See* J.A. 35.

[14] *See* J.A. 123.

[15] *See* J.A. 123-24.

[16] *See* J.A. 126. GM's agreement to recall vehicles equipped with 193-carburetors was not purely altruistic. Although GM continued to contend that the 193-carburetor vehicles complied with emissions standards, there was no practical method of determining which of the carburetors was installed in a given 1975 Cadillac until it had been brought into the repair shop. *See id.*

[17] A manufacturer notified of a determination of nonconformity is required to submit a remedial plan for the Administrator's approval. *See* Clean Air Act § 207(c)(1), 42 U.S.C. § 7541(c)(1) (Supp. V 1981); 40 C.F.R. §§ 85.1803-85.1804 (1982). The manufacturer must demonstrate both that the proposed remedy is technically sound and that it can and will be properly implemented. *See* 40 C.F.R. §§ 85.1803-85.1804 (1982).

1979.[18] Finally, on December 26, 1979, EPA withdrew one of its principal objections and agreed to approve a

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[18] *See* J.A. 137, 142, 145, 170, 182, 203, 224, 226, 230, 236, 247, 252.

Much has been made by both parties of the time lag between initial notification of nonconformity and the EPA's ultimate approval of the remedial plan and of the appropriate allocation of blame for the delay. The EPA maintains that its original refusal to approve GM's proposed remedial plan was premised on two principal concerns. First, GM had failed to demonstrate that the repair proposed for the 193-carburetor would actually remedy the nonconformity in those vehicles. Second, the adjustment's actual or perceived adverse effect on the drivability of the Cadillacs might induce mechanics, fearing customer dissatisfaction, to refuse to perform the repair properly. *See* J.A. 137-38, 142. GM tested the 193-carburetor vehicles and discovered that its proposed repair did not in fact remedy the nonconformity, yet did not submit a revised remedial plan until January 30, 1978. *See* J.A. 203. A few minor modifications to this plan were made at the request of the EPA and were incorporated in a new revised remedial plan submitted on February 15, 1978. *See* J.A. 224. This is the plan that was ultimately approved by the EPA. *See* J.A. 252-55, 261-64. GM attempts to excuse its delay on the ground that the 193-carburetor recall was voluntary and did not require EPA approval. *See* GM Reply Brief at 12-13. However, once GM's own testing had revealed that half of the sample of eight vehicles failed to meet carbon monoxide emissions standards and that the repair originally proposed failed to remedy this problem, *see* J.A. 170, it seems fair to assume that the EPA refrained from ordering a recall of the 193-carburetor class only because the details of the "voluntary" recall were currently being negotiated.

To alleviate its concerns with respect to mechanics' motivation to perform the repairs properly, EPA proposed, among other measures, that GM conduct a performance audit. *See* J.A. 142-43. GM agreed to some of the measures but refused to assume responsibility for an audit, arguing both that an audit was unnecessary and that it would place GM in an adversary relationship with its own dealers. *See* J.A. 203-06. Although EPA continued to insist on its authority to require GM to perform the audit, EPA ultimately dropped its demand

modified plan that had been submitted by GM on February 15, 1978.[19]

At this point, however, GM informed the EPA that "[a]bout forty percent of the subject vehicles are beyond five years old and many more will have accumulated more than 50,000 miles." [20] GM urged the Administrator to cancel the recall and averred that, if the EPA were to go forward with the recall, "only those vehicles within the lesser of five years or 50,000 miles of operation at the time of presentation to the dealer for repairs will receive the campaign adjustments at General Motors (*sic*) expense." [21] EPA responded on May 30, 1980 by promul-

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that GM conduct the audit and decided instead to conduct an audit itself. *See* J.A. 254. GM argues that, because EPA's insistence on a GM-conducted audit which "it had no right to demand and which it dropped in the final approval" was the real cause of the delay, *see* GM Reply Brief at 12, "it is arbitrary and capricious for EPA to assert in 1980 that GM now should repair vehicles which have exceeded their useful lives." GM Brief at 35.

Because of our disposition of EPA's interpretative rule and order on other grounds, we need not reach the question of EPA's authority to require manufacturers to conduct recall audits nor need we assign to either party full responsibility for the delay that resulted in the vast majority of the vehicles having exceeded their useful lives by the time the recall plan was approved. *See* J.A. 258, 261 (estimating only 52,000 of the 220,000 vehicles remained within their useful lives at the time of conditional approval of the remedial plan). We do note, however, that the audit issue was not a frivolous question, that it was hotly contested by both parties for some time in what we can presume to have been good faith, and that it is illustrative of the type of controversy that can prolong approval negotiations despite the best intentions and cause the "useful life" problem to arise again in the future.

[19] *See* J.A. 252-55. *See supra* note 18.

[20] J.A. 257.

[21] J.A. 259. GM maintains that this statement, contained in a letter to the EPA dated February 5, 1980, merely reiterated the position GM had first taken in January 1979. *See* GM Brief at 5. EPA insists that the February 1980 letter "was

gating what it labelled an "interpretive rule" [22] setting out the EPA's position that the Clean Air Act requires

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the first time that GM had proposed to impose a 5/50 limitation on a remedial plan." EPA Brief at 11. Whether there was verbal communication between GM and EPA on this issue before February 1980 we cannot say; there is, however, nothing in the record before this court to document any exchange between GM and EPA concerning the 5-year/50,000-mile limitation prior to the February 1980 letter.

After the February letter, GM imposed but later withdrew 5-year/50,000-mile limitations in several other pending recalls. *See* EPA Brief at 11 & nn. 17-18. Consequently, the 1975 Cadillac recall is the only situation which to the court's knowledge presently involves a dispute between the EPA and a manufacturer concerning the extent of a manufacturer's liability to recall and repair vehicles beyond their useful lives.

[22] Section 307(d)(2)-(6) of the Clean Air Act, 42 U.S.C. § 7607(d)(2)-(6) (Supp. V 1981), establishes certain procedural requirements in connection with agency promulgation of rules. The Act requires, *inter alia*, establishment of a rulemaking docket, publication of notice of proposed rulemaking in the *Federal Register*, a specified period for receipt of public comment, public access to the docket materials, and response by EPA to each significant comment, criticism, and submission of data. *Id.* However, section 307(d)(1) of the Act provides, in relevant part: "This subsection shall not apply in the case of any rule or circumstance, referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5 [of the United States Code]." 42 U.S.C. § 7607(d)(1) (Supp. V 1981). The relevant provision of title 5 provides in turn that rulemaking procedures need not be applied "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ." 5 U.S.C. § 553(b)(A) (1982). Thus, by casting the regulation as an interpretative rule, the agency was able to circumvent most of the rulemaking requirements of the Clean Air Act. The EPA did create and provide access to a public docket in connection with the promulgation of the May 30 rule (although the utility of even that exercise must be questioned in light of the absence of the public comments that would normally arouse interest in the docket), but none of the other rulemaking procedures were observed. *See* 45 Fed. Reg. 36,396, 36,397 (May 30, 1980).

"manufacturers to submit a plan to remedy all vehicles within the class or category of vehicles subject to an ordered recall which experienced the nonconformity during their useful lives regardless of their age or mileage at the time of repair." [23] Shortly thereafter, the EPA wrote to GM, refusing to withdraw the recall order.[24] The EPA letter formally approved GM's remedial plan of February 15, 1978 insofar as it applied to vehicles still within their useful lives at the time of repair.[25] But, relying on the May 30 rule, the agency disapproved the plan insofar as it related to vehicles beyond their useful lives.[26] The letter also reflected EPA's finding that, at least with respect to vehicles beyond their useful lives, GM had "failed to submit a [remedial] plan as required by section 207(c)(1) of the Act. . . ." [27] GM petitioned this court, seeking review of both the May 30 rule and EPA's partial disapproval of GM's remedial plan.[28]

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[23] 45 Fed. Reg. 36,396, 36,396-97 (May 30, 1980) (presently codified at 40 C.F.R. § 85.1803, app. A to subpart S (1982)).

[24] *See* J.A. 261-64 (EPA Letter dated June 23, 1980).

[25] *Id.* GM agreed to proceed with the recall of these vehicles. *See* J.A. 308.

[26] *See* J.A. 261-64.

[27] J.A. 263. The Administrator warned GM that "[t]he failure to submit a plan for these vehicles is considered to be a separate offense under sections 203(a)(4)(B) and 205 of the Act for each vehicle and can potentially subject GM to fines of up to $10,000 per vehicle." *Id.*; *see* Clean Air Act §§ 203(a)(4)(B), 205, 42 U.S.C. §§ 7522(a)(4)(B), 7524 (Supp. V 1981).

[28] On November 26, 1980, EPA published a notice in the *Federal Register* declaring its partial approval and partial disapproval of GM's remedial plan to be "final." *See* 45 Fed. Reg. 78,798, 78,798 (Nov. 26, 1980). GM subsequently filed a protective petition, consolidated with its previous appeals, seeking review of this *Federal Register* notice.

ANALYSIS

A. *Standard of Review*

We begin by noting that we are called upon in this case to review an *interpretative*, not a *legislative*, rule. While this observation may seem apparent, the nature of the May 30 rule has been hotly contested by the parties. Although EPA has from the start characterized the rule as "interpretive," [29] GM argues that, because the rule substantially expands the scope of a manufacturer's liability under the recall provisions of the Act, the rule should be viewed instead as an improperly promulgated legislative rule.[30]

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[29] *See* 45 Fed. Reg. 36,396, 36,396-97 (May 30, 1980).

[30] GM Brief at 12-22.

GM also argues that the rule must be considered legislative because of the limitations on judicial review imposed by the Act. GM Brief at 21-22. One of the distinguishing features of an interpretative rule is its lack of binding force upon courts; such rules are always subject to challenge in later judicial proceedings. *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) ("[A] court is not required to give effect to an interpretative regulation."); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979); Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.24, 1154 n.26 (D.C. Cir. 1977); Gibson Wine Co. v. Snyder, 194 F.2d 329, 331-32 (D.C. Cir. 1952); *see generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7:8, 7:13 (2d ed. 1979 & Supp. 1982). However, section 307(b)(1) of the Act provides in relevant part:

> A petition for review of . . . any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia . . . . Any petition for review under this subsection *shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register* . . . .

42 U.S.C. § 7607(b)(1) (Supp. V 1981) (emphasis supplied). Section 307(b)(2) goes on to provide that any "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to

Where, as here, an agency has the authority to issue both legislative and interpretative rules,[31] the line be-

judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2) (Supp. V 1981). Apparently, both GM and EPA read this language as rendering any rule, whether such rule was originally intended to be interpretative or legislative in character, binding on the courts if not challenged within 60 days after its promulgation. *See* GM Brief at 21-22; EPA Brief at 42-46; GM Reply Brief at 2-3, 14-19. Consequently, GM argues, if the review provisions render *any* nationally applicable regulation binding on the courts after 60 days, then *all* such regulations must by definition be legislative and not interpretative. *See* GM Brief at 21-22; GM Reply Brief at 14-19.

The Supreme Court has previously taken note of the constitutional problems that review limitations such as section 307(b) may present. *See, e.g.*, Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 n.9 (1980) (opinion of the Court); *id.* at 594-95 (Powell, J., concurring opinion); Adamo Wrecking Co. v. United States, 434 U.S. 275, 289-91 (1978) (Powell, J., concurring opinion). The issue, however, has not thus far arisen in a posture that would permit its resolution, nor does it so arise in this case. Suffice it to say that a limitation on judicial review does not lend to an interpretative rule any binding force not already provided by the underlying statute. *See* Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979). A court always has the power to substitute its judgment for that of the agency in the case of an interpretative rule, even though courts customarily accord some measure of deference to an agency's interpretation of a statute for which it has been assigned the responsibility for enforcement. *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); 2 K. DAVIS, *supra*, at §§ 7:8, 7:13. Thus, in cases arising after the 60-day review period has expired, the court may undertake and enforce its own interpretation of the statute without reviewing the interpretative rule as such. And, in any event, the 60-day limitation period may not begin to run with respect to interpretative rules until a fact-based controversy is ripe for judicial review. *See* Baltimore Gas and Elec. Co. v. ICC, 672 F.2d 146, 147-50 (D.C. Cir. 1982) (interpreting an analogous 60-day review limitation).

[31] *See* Citizens to Save Spencer County v. EPA, 600 F.2d 844, 873-74 (D.C. Cir. 1979).

tween the two is often blurred.[32] Nevertheless, the determining factor is the agency's authority and intent in promulgating the rule.[33] Although an agency's own labelling of a rule is not dispositive of the question of intent,[34] it is indicative and is entitled to judicial deference.[35] There is nothing in this record to suggest that EPA ever intended this rule to carry any weight beyond that ordinarily attending an agency's interpretation of a statute.[36]

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[32] Chamber of Commerce v. Occupational Safety and Health Admin., 636 F.2d 464, 468 (D.C. Cir. 1980) (opinion of the court); *id.* at 471 (Bazelon, J., concurring opinion).

[33] *Id.* at 468; Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977); *see generally* 2 K. DAVIS, *supra* note 30, at §§ 7:8-7:13, 7:15.

[34] *See* Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407, 416 (1942); *Chamber of Commerce*, 636 F.2d at 468; *Citizens to Save Spencer County*, 600 F.2d at 879 n.171.

[35] *See Chamber of Commerce*, 636 F.2d at 468; *see also* Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082, 1092 (Temp. Emer. Ct. App. 1978).

[36] When the rule was first published it was classified as "interpretive" and described as

> set[ting] forth EPA's *interpretation* regarding one aspect of a motor vehicle or motor vehicle engine manufacturer's recall liability under section 207(c)(1) of the Clean Air Act . . . . EPA *interprets* this section as requiring manufacturers to submit a plan to remedy all vehicles within the class or category of vehicles subject to an ordered recall . . . regardless of their age or mileage at the time of repair. The *interpretation* set out in this rule will provide guidance to vehicle and engine manufacturers to better enable them to submit acceptable remedial plans.

45 Fed. Reg. 36,396, 36,396-97 (May 30, 1980) (emphasis supplied). Throughout this litigation, EPA has never claimed any authority for its rule other than that conveyed by the

The Supreme Court has pointed out that "[o]rdinarily, administrative interpretations are given important but not controlling significance." [37] The precise weight to be accorded an interpretative rule "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." [38] The EPA rule does not receive "high marks when judged by [these] standards . . . ." [39] The rule was not a contemporaneous interpretation of the Clean Air Act, and there is no evidence that it reflects a longstanding interpretation of the Act by the agency.[40] Nor

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statute itself. Thus, there is no need to turn to the effect of the rule in order to ascertain agency intent. If the effect of the rule exceeds that of the statute itself, then the rule will have surpassed the bounds of permissible statutory interpretation.

[37] Batterton v. Francis, 432 U.S. 416, 424 (1977).

[38] General Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see id.* at 141-42; 151-53; *Batterton*, 432 U.S. at 425 n.9 ("[A] court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position and the nature of its expertise.").

[39] *General Elec. Co.*, 429 U.S. at 143.

[40] EPA argues that its interpretation is longstanding. Yet, with the exception of the dispute with GM leading to the promulgation of the May 30 rule, the agency can point to only one controversy, the Chrysler recall in February 1979, during which the useful life issue arose. *See* EPA Brief at 5 & n.5. However, by the EPA's own admission, the agency did not press the issue with Chrysler, because the question of nonconformity was itself being litigated. *See id.* Thus, even assuming that a lifespan barely exceeding one year suffices to render an interpretation longstanding, it would appear that

the public was never placed on notice with respect to EPA's interpretation.

The dissent contends that, nevertheless, the EPA interpretation should be considered longstanding precisely *because* the question of a manufacturer's liability for repair of vehicles beyond their useful lives has never previously arisen. *See* Dissenting Opinion at 5 n.5. Yet, this novel approach to defining "longstanding" interpretations is not supported by the cases on which the dissent relies. In Esquire, Inc. v. Ringer, 591 F.2d 796, 801 (D.C. Cir. 1978), we did hold that an administrative interpretation that "has been consistently followed for a significant period of time" is entitled to judicial deference. Yet we found that the administrative interpretation under review in that case was longstanding, because it had been consistently asserted and followed by the agency since 1909 in the face of a long series of challenges. *Id.* at 802 & nn.19-20. Similarly, in DeLano v. United States, 393 F.2d 517, 521-22 (Ct. Cl. 1968), the railroad's failure to challenge overtime billing for customs inspections performed on board trains was seen as indicative of the "reasonableness" (not the longstanding nature) of the Immigration Service's interpretation of its overtime regulations. There, the agency's policy had been publicly announced and implemented for over 15 years. *Id.* at 521. Railroads had been affirmatively required to pay on the basis of the agency's overtime interpretation. In the instant case, however, the EPA has previously announced its position only once and, in that instance, recanted. We are pointed to no other occasion on which the EPA required manufacturers to include vehicles beyond their useful lives in their remedial plans; the issue simply was never raised by either party.

Judge Wald's view of the EPA's position as "longstanding" apparently presumes that manufacturers (1) prophetically foresaw EPA's heretofore unannounced interpretation of their liability for repair of vehicles beyond their useful lives; (2) conceded the "reasonableness" of EPA's position; and (3) therefore, "voluntarily" included older vehicles in their remedial plans, refraining from challenging this manifestly "reasonable" interpretation. A far more plausible explanation for the lack of 5/50 controversies avails itself. The statistical data supplied by the EPA indicates that, with the exception of the Chrysler and Cadillac recalls in which useful life disputes did arise, virtually all completed emissions recalls have involved vehicle classes less than three years of age at the

time of owner notification of nonconformity by the manufacturer. *See* J.A. 278-96. The median class age is approximately 2.5 years; the mean, slightly less than 2.6 years, and the mode, less than one year. EPA data also reveal that, at an age of one year, only 2% of vehicles are likely to have exceeded 50,000 miles; at age 2, 6%; at age 3, 20%; at age 4, 39%; and at age 5, 60%. J.A. 274. Finally, EPA statistics indicate that the owner response rates drop substantially for vehicles more than four-years old (median owner response for vehicles between four and five years of age is between 20 and 30%, and no owner response is indicated for vehicles more than five years of age). *See* J.A. 298. This information forms a strong basis for the inference that both the EPA *and* manufacturers in previous recalls have failed to raise the question of liability for repair of cars beyond their useful lives *because the involvement of such vehicles in the recalls has been de minimis.* Few vehicles beyond their useful lives were putatively subject to recalls; of these, only a handful could have been expected actually to have been presented for repair. It simply would not have been economical for manufacturers to have expended the resources necessary to identify those vehicles beyond their useful lives or to risk owner alienation and *possible* reaction from the EPA (although the EPA's position concerning such matters was at the time unknown) by refusing to repair the tiny percentage of older cars which might have found their ways to dealerships in response to a recall.

In contrast, in the two major recalls in which 5/50 limitations were imposed, a substantial percentage of the vehicles in the class were beyond their useful lives. The EPA recalled 1975 Chryslers in December 1976. J.A. 281. After a hotly contested dispute over the existence of the emissions nonconformity, Chrysler imposed a 5/50 limitation in December 1978. *Id.* At that point, the class was 51 months old and over 40% of the vehicles had exceeded their useful lives. Moreover, since Chrysler's appeal of the EPA's recall order was still pending in this court, virtually the entire class could have been expected to have exceeded their useful lives before owner notification took place. Similarly, in this case, the model was beyond the five-year point by February 1980 when, after a prolonged and often hostile negotiation process, GM finally imposed a 5/50 limitation on repair of its 1975 Cadillacs. *See* J.A. 286.

The dissent responds that "in six out of the fifteen recalls described in detail in the record, . . . the EPA issued a recall notice to the manufacturer 34-55 months after the cars were

on the market." Dissenting Opinion at 5 n.5. However, we believe that the dissent's method of computation produces an inflated picture of the average age of recall classes. For example, the dissent includes two recalls which were incomplete at the time the record in this case was submitted. However, it is impossible to tell, until owner notification has begun, whether a manufacturer will ultimately assert a 5/50 limitation. For example, in this case GM submitted several remedial plans without asserting such a limitation; indeed, the 5/50 limitation was not imposed until *after* the EPA had approved GM's remedial plan. Thus, incomplete recalls are useless for purposes of discerning *why* manufacturers failed to impose 5/50 limitations prior to the Cadillac recall.

The dissent also presents figures on three recalls that "involved" large numbers of older vehicles (1975 and 1976 Pontiacs, 1975 Fords, 1974 AMCs); yet, in each case, these vehicles were part of a larger recall class, spanning several model years, in which the majority of the cars involved were younger. We respectfully suggest that employing the mean age of the recall class as a whole would present a more accurate picture of the proportion of older cars in a given recall that the manufacturer might have had to fix without a 5/50 limitation. For example, 54% of the 1975 model Pontiacs may have been beyond their useful lives in 1979, yet 1975 Pontiacs represented only one-quarter of the cars involved in the Pontiac recall which included model years 1975-1978. Similarly, the 1978 Ford recall to which the dissent refers included 1975 and 1976 Fords, and the 1978 AMC recall spanned the model-years 1974 through 1976.

The AMC recall points to another flaw in the dissent's statistical formulation. In that recall, the EPA ordered the recall of all 1976 AMC cars in May 1978. At that point, the model was approximately two-and-a-half years old and fewer than 20% of the vehicles could have been expected to have exceeded their useful lives. We are told that AMC "indicate[d] it [would] include 1974, 1975, and 1976 AMC cars sold in California in its plan." J.A. 291. The exact motive for this inclusion is not disclosed by the record, but it is clear that AMC included these vehicles voluntarily, perhaps out of a concern for their ability to meet more stringent California state emissions requirements. However, the dissent points to the 1974 AMCs included in this recall as evidence of a class involving large numbers of cars beyond their useful lives for

which the manufacturers did not impose a 5/50 limitation. We would suggest, with all due deference, that such use of data is inappropriate (1) because only *California* vehicles from the 1974 and 1975 AMC model-years were included in the recall, thus making them a relatively small proportion of the recall class which was overwhelmingly composed of 1976 AMCs; and (2) these vehicles were included *voluntarily*, thus indicating the manufacturer's willingness to go beyond EPA's requirements.

Finally, the dissent presents its data only in terms of the percentage of older cars it contends were present in the recall class; however, that figure must be multiplied by the projected owner response rate to determine the percentage of cars the manufacturer would have anticipated actually having to fix. Thus, even if 20% of the cars in a given class were beyond their useful lives at the time of owner notification, and a 20% owner response rate could be expected for those cars, only 4% of the cars presented for repair could be expected to be beyond their useful lives. (This figure, of course, would have to be adjusted by the response rates for vehicles of varying ages within their useful lives.) In fact, as indicated above, the response rate for vehicles beyond their useful lives approaches zero. Therefore, even assuming the statistical validity of the dissent's calculations, manufacturers in past recalls would have had to repair few, if any, vehicles beyond their useful lives, whether or not 5/50 limitations had been imposed.

In the few recalls, other than the Chrysler and Cadillac recalls, in which significant numbers of vehicles beyond their useful lives were involved, potent reasons existed for the manufacturers to refrain from invoking 5/50 limitations. One manufacturer "requested additional time to develop a durable replacement component to use in a recall campaign." J.A. 268. The manufacturer's failure to adhere to its own production timetable resulted in approximately 70,000 vehicles (most of them apparently from earlier model years voluntarily included in the recall, *see* J.A. 291) having exceeded their useful lives by the time owner notification began. J.A. 268. Similarly, another manufacturer requested additional time to develop a less expensive remedial repair part, resulting in savings to the manufacturer of $3.2 million. J.A. 269. A third carmaker convinced the EPA to consent to two audited sample recalls in an unsuccessful attempt to demonstrate that defective carburetors could be repaired instead of replaced; the

does the rule involve the kind of fact-intensive questions concerning which great deference need be given the agency's technical expertise; rather, as the agency itself concedes, "[s]ince the rule simply expresses an interpretation of the law based on the language, legislative history and policy of the Clean Air Act, no factual data need be analyzed or commented on."[41] Consequently, although some deference is to be accorded to the May 30 rule, our inquiry will focus on whether EPA's interpretation is reasonable and supportable in light of the statutory language and legislative history.[42]

B. *Statutory Language*

In reviewing an agency's interpretation of a statute, a court should first examine the language of that statute to determine whether the interpretation falls within the statute's plain meaning.[43] In the instant case, however,

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delays consumed three years. *Id.* Manufacturers who hope to call upon the EPA's good graces in the future are hardly in a position to invoke 5/50 limitations when the delays they have asked the EPA to tolerate in order to mitigate the expense of a recall result in large numbers of vehicles having exceeded their useful lives when presented for repair.

Indeed, EPA provides information on only two completed recalls in which large numbers of vehicles beyond their useful lives could have been expected to have been presented for repair and special circumstances militating against a manufacturer's invocation of a 5/50 limitation were not involved. These were the Chrysler and the Cadillac recalls. In both, the manufacturers imposed 5/50 limitations. In the former, the EPA ultimately acceded to the limitation; in the latter, obviously, it has not. Such a history does *not* a "longstanding" interpretation make.

[41] EPA Brief at 41.

[42] Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980); Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979).

[43] *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Touche Ross & Co. v. Reding-

the statutory language is ambiguous at best. Section 207 (c) (1) of the Act provides in relevant part:

> If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to . . . [emissions standards], when in actual use throughout their useful life . . . , he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer.[44]

EPA construes the requirements of the entire section as "class-based." Under the agency's interpretation, once the Administrator determines that a substantial number of vehicles in the *class* fail to conform to standards during their useful lives, the manufacturer is notified of the nonconformity of the *class*. The manufacturer must then submit a remedial plan for the entire *class* of vehicles, providing for the repair at the manufacturer's expense of all vehicles or engines that are members of the *class*. The only exception is for vehicles that have not been properly used and maintained. Indeed, the very existence of this exception for improperly used and maintained vehicles is said to highlight the absence of an explicit exclusion of vehicles beyond their useful lives.[45]

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ton, 442 U.S. 560, 568 (1979); Caminetti v. United States, 242 U.S. 470, 485 (1917); Symons v. Chrysler Corp. Loan Guar. Bd., 670 F.2d 238, 241 (D.C. Cir. 1981); Higgins v. Marshall, 584 F.2d 1035, 1037 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 931 (1979).

[44] Clean Air Act § 207(c)(1), 42 U.S.C. § 7541(c)(1) (Supp. V 1981).

[45] *See* EPA Brief at 22 & n.26.

GM focuses instead on the concept of nonconformity. Although the manufacturer is notified of the nonconformity of the class of vehicles on the basis of the failure of a substantial number of its members to conform to standards during their useful lives, the remedial plan must address the nonconformity of the individual vehicles in the class, and it is the nonconformity of such vehicles that is to be remedied at manufacturer expense. However,

> "[n]onconformity" is a word having meaning only for vehicles for which the Act and EPA regulations set emissions standards. The Act does not set nor does it authorize EPA to prescribe emissions standards for any vehicle which has exceeded its 5 years 50,000 miles "useful life". A vehicle which has passed that limit cannot be in "nonconformity" with any emissions standard and, therefore, the law cannot require that any "remedy" be provided for a nonexistent nonconformity.[46]

GM's viewpoint is not without merit. Classes of vehicles can be recalled, and remedial plans can be prepared, on a classwide basis. Yet the actual remedy of the nonconformity of a class of vehicles can only be accomplished by the repair of individual vehicles. The repair of a vehicle presupposes the existence of a defect or nonconformity in that vehicle, but a vehicle cannot fail to conform to a standard which does not apply to it. Thus, vehicles beyond their useful lives have no nonconformity to be remedied. Indeed, their "repair" does not even contribute to the remedy of the nonconformity of the class, since vehicles beyond their useful lives are no longer part of the nonconforming class.[47]

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[46] GM Brief at 20; *see id.* at 19-20, 23-26.

[47] The dissent, like the EPA, makes much of the classwide nature of the manufacturer's remedial obligation. *See* Dissenting Opinion at 4-9, 12, 14 nn.11&12, 18-19; *see also infra* note 50. Yet, assuming *arguendo* that it is the nonconformity of the class—and not the nonconformity of individual vehi-

EPA attempts to circumvent this reasoning by conceding that the manufacturer is not required to repair vehicles which first exceed standards after five years or 50,000 miles.[48] Moreover, "for those vehicles [beyond their useful lives] which are subject to repair at manufacturer expense, the manufacturer is only responsible to carry out the remedy contained in the approved plan and is not responsible to remedy any other nonconformities."[49] However, these concessions appear to generate more problems than they resolve.

First, EPA's interpretation relies upon the assumption that, because a "substantial number" of cars are found to exceed vehicle emissions standards during their useful lives, the entire class of cars of that engine-family and model-year is suspect and ought to be subject to recall. The function of this class-based analysis is to shift the focus of attention away from the time-consuming and expensive task of establishing the nonconformity of each

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cles—that the statute requires manufacturers to remedy, *see* Dissenting Opinion at 14 n.11 ("Congress intended to provide classwide remedies for classwide . . . defects that showed up during the useful life of the cars listed as representative samples of the class. A defective class—its members (*sic*)—can therefore be deemed 'nonconforming.' "), a manufacturer still need not "repair" vehicles beyond their useful lives to effect a remedy of the class. If a class is nonconforming when a representative sample of its members demonstrates nonconformity with emissions standards *during the useful lives of the sample vehicles*, then it follows that a class is restored to conformity when the EPA can no longer muster such a sample. Since vehicles beyond their useful lives can never form part of the sample upon which an inference of class conformity or nonconformity is founded, "repair" of such vehicles, as noted above, contributes nothing to the remedy of the class.

[48] *See* 45 Fed. Reg. 36,396, 36,397 n.2 (May 30, 1980); EPA Brief at 20 n.25.

[49] 45 Fed. Reg. 36,396, 36,397 n.2 (May 30, 1980).

individual vehicle so that those resources may be devoted to remedying the nonconformity of the class as a whole. Yet EPA's exception with respect to vehicles first exceeding standards after the expiration of their useful lives undermines its own class-based inquiry.[50] Instead, the EPA invites manufacturers to indulge in fact-specific controversies concerning whether a given car, beyond its useful life when presented for repair, experienced nonconformity during its useful life or first exhibited excessive emissions after its useful life had expired.

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[50] The dissent's apparent approval of EPA's concession, *see* Dissnting Opinion at 14 n.12, is similarly inconsistent with the dissent's position that *all* vehicles which are part of a nonconforming class are subject to repair at manufacturer expense, *see id.* at 4-9, 14 & n.12. If, as the dissent believes, the "statute . . . require[s] the manufacturers to include a car in their remedial plans if (1) a substantial number of cars exhibit nonconformity during their useful lives, and (2) the car is a member of that class," *id.* at 4; *see id.* at 13 n.10, then the time of the onset of nonconformity in a particular vehicle should be irrelevant to the manufacturer's liability for repair of that car. Indeed, the dissent's analysis produces the "bizarre result," *id.* at 4, that even the *existence* of an *individual* vehicle's conformity or nonconformity is beside the point; *class* conformity is all that matters! *Id.* at 14 n.11 ("Congress intended to provide classwide remedies for classwide design or performance *defects that showed up during the useful life of the cars listed as representative samples of the class.* A defective class—its members (*sic*)—can therefore be deemed 'nonconforming.'" (emphasis supplied)); *id.* at 18-19 ("The statute thus mandates *classwide* notice without limitation, and requires the manufacturer to repair all cars and engines 'with respect to which [such] notice is given.'" (emphasis and alteration in original)); *id.* at 19 ("The statute may fairly be read to require classwide notice, regardless of whether some members of the class have exceeded their useful lives."); *see generally id.* at 4-9. Yet, pragmatically, the only way to remedy class nonconformity is by repairing individual vehicles. And, to paraphrase the familiar adage, "if it ain't broke, you can't fix it."

EPA's concession not only erodes its own class-based theory, but also offers little relief to manufacturers in practice. If the car is not presented for repair until it has exceeded its useful life, how will the timing of the onset of excessive emissions be established? On whom will the burden of proof rest? This difficulty of proof is compounded by the manner in which the recall system operates. The presumption of class nonconformity is based on testing of a relatively small sample of cars.[31] On the basis of such sampling, an estimate of the percentage of cars in nonconformity is made; this percentage will often be substantially less than one hundred percent. In this case, the EPA originally estimated that forty-three percent of the class would exceed standards;[32] this estimate was later increased to sixty-eight percent.[33]

Thus, on the basis of the statistical evidence in this case, it would appear that between thirty-two and fifty-seven percent of the cars in the class—whether or not they have exceeded their useful lives at the time that notice of class nonconformity was given or at the time of repair—are likely to have been in compliance with the applicable emissions standards throughout their useful lives.[34] In the case of cars still in their useful lives, the

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[31] In this case, the samples appear to have been 14 or 15 cars of the 230-carburetor family and 8 of the 193-carburetor family. *See* J.A. 125, 170.

[32] *See* J.A. 35.

[33] *See* J.A. 123.

[34] Thus, contrary to the contention of the dissent, better than half of the cars in the class may *not* "have been riding the roads for years in violation of pollution standards." Dissenting Opinion at 2. Moreover, whatever "public benefit" might be derived from improving the emissions performance of vehicles beyond their useful lives, *see id.* at 2-3, may not be achieved by imposing on manufacturers a liability beyond that which Congress has seen fit to prescribe.

manufacturer may establish, through testing once the cars have been recalled, that a particular car is in compliance and, therefore, no repair would be necessary for that car. Under the EPA's interpretation, however, such a showing may be impossible with respect to cars that have exceeded their useful lives when presented for repair. Congress clearly has contemplated some increase in a car's emissions once the vehicle has surpassed its useful life.[35] However, when a car brought in for repair has exceeded its useful life, the manufacturer will be unable to demonstrate whether a present emissions excess is attributable to this sanctioned erosion in performance or to a nonconformity existing during the vehicle's useful life. In essence, the May 30 rule establishes an absolute and irrebuttable presumption that *all* older cars were among the percentage failing to meet standards during their useful lives. The establishment of such a presumption might be within the agency's authority, but it goes well beyond simple statutory interpretation.

The agency's answer to the problem posed by requiring cars to be brought into conformity with a standard which no longer applies to them is equally disingenuous. The agency explains that manufacturers would not be required to bring cars beyond their useful lives when presented for repair up to the same standards applicable to "younger" cars. Instead, the manufacturer would only be required to perform the same repair on older cars as is mandated for younger vehicles by the remedial plan.

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[35] *See* S. REP. No. 1196, 91st Cong., 2d Sess. 30 (1970), *reprinted in* 1 SENATE COMM. ON PUB. WORKS, 93RD CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 430 (1974) [hereinafter cited as *1970 Legislative History*]. Indeed, Congress reduced the useful life to which emissions standards would apply from 10 years to 50,000 miles in response to industry representations that manufacturers could not guarantee conformity for a 10-year useful life. *See id.*

This response is not entirely forthcoming. In this case, the repair required under the remedial plan involves adjustment of the idle screw and the adjustable part throttle plug to a specified RPM drop.[56] Thus, under the precise facts of this case, there is a difference between requiring the "same repair" to be made on all cars and requiring all vehicles, regardless of age or mileage, to be brought into conformity with emissions standards. However, in other recall situations the required repair *is* to bring the car to a particular emissions ratio. In a recent Chrysler recall, for example, the remedy required a mechanic to attach an exhaust emissions analyzer to the catalyst tap and then to adjust the mixture screws back and forth until the idle carbon monoxide concentration met specifications.[57] In cases in which the required repair is not a "fixed" adjustment but rather a "fine-tuning" process, the effectiveness of which is measured by conformity to emissions standards, a blanket rule disregarding the age of the car when presented for repair in effect requires the manufacturer to make an older car meet standards that Congress intentionally required only younger cars to meet. By imposing such a requirement, the EPA rule again exceeds the limits of permissible statutory interpretation.[58]

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[56] *See* J.A. 165-67.

[57] *See* Chrysler Corp. v. EPA, 631 F.2d 865, 870-71 (D.C. Cir. 1980).

[58] The dissent complains that the "majority, in hypothesizing about possible future problems in the implementation of EPA's rule, exceeds the proper scope of an inquiry into the validity of a rule." Dissenting Opinion at 16 n.13. The dissent's concern for limiting the scope of our inquiry to the facts of this particular case might be well placed had the GM recall order alone been brought before this court for review. However, the dissent seems to have forgotten that we have also been called upon to review the validity of EPA's interpretative rule itself. *See supra* text accompanying note 28. It is clear beyond peradventure that the validity of a rule can be

Even if every recall involved remedies in which the "repair" could be performed on older vehicles without

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ripe for review whether or not it has actually been improperly applied and enforced in a concrete factual setting. *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 585-86 (1981) (reviewing the validity of a Policy Statement not then applied to any particular set of facts); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 301-03 (1979) (statutory procedures, restrictions, and penalties, though not invoked, are ripe for review); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 81-82 (1978) (constitutionality of statutory limitation of liability for nuclear accidents ripe for review before any nuclear disaster occurs); National Wildlife Fed. v. Snow, 561 F.2d 227, 236-37 (D.C. Cir. 1976); Continental Air Lines, Inc. v. CAB, 522 F.2d 107, 124-26, 128 (D.C. Cir. 1975) (en banc); *see generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 25:6—25:10 (2d ed. 1983).

Taken on its face, the EPA rule would require cars beyond their useful lives to be brought into conformity with standards which do not apply to them. The EPA attempted at oral argument to salvage the rule from this conspicuous defect by asserting that the agency will not in fact require such vehicles to be brought into compliance with inapplicable standards but will instead require the same "repair" to be made on older and younger vehicles. If we have in any way "exceed[ed] the scope of [our] proper inquiry," it has been by giving *any* consilderation to this *post hoc* rationalization of the agency's actions. *See, e.g.*, Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962); SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947); SEC v. Chenery Corp., 318 U.S. 80, 87 (1943); Tabor v. Joint Bd. For the Enrollment Of Actuaries, 566 F.2d 705, 709-12 (D.C. Cir. 1977); KIRO, Inc. v. FCC, 545 F.2d 204, 208 (D.C. Cir. 1976). Nevertheless, out of deference to the agency we did consider EPA's extra-record gloss on its rule, but we found the modification to be as fatally flawed as is the rule itself. The fundamental difficulty with the "same repair" explanation, as discussed in text below, is its inconsistency with the statute: the Act requires not that a "repair" be performed, but that a nonconformity be remedied. Nearly as compelling,

their having to be brought into compliance with standards no longer applicable to them, the EPA rule would nevertheless be an unreasonable interpretation of the statutory mandate. If the "repair" does not bring the vehicle on which it is performed back into compliance

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however, is the fact that EPA's modification will not alter the impermissible effect of the rule in many of the recalls to which the rule can reasonably be expected to apply. We have not had to "conjure up" or "hypothesize" situations in which the EPA's modified interpretation collapses. Indeed, we have had to look no farther than the last major EPA recall reviewed by this court, *see* Chrysler Corp. v. EPA, 631 F.2d 865, 870-71 (D.C. Cir. 1980), to discover that requiring older vehicles to conform to inapplicable standards and requiring them to be subjected to "the same repair" as younger vehicles may amount to the same thing. In situations in which the required repair involves a fine-tuning process rather than a "fixed number of turns of the screwdriver," the EPA's modification represents, with respect to the rule itself, a distinction without a difference.

The rule before us purports to require all manufacturers to include cars beyond their useful lives in their remedial plans. Were this court to uphold that rule, the rights of manufacturers *would be* "prejudiced prior to judicial review . . . of some future recall." *See* Dissenting Opinion at 16 n.13. The age and mileage of a car would become irrelevant to the question of a manufacturer's liability for its repair in *all* future recalls. The EPA asks us to affirm such a blanket imposition of liability on the pretext that the manufacturer will be able to negotiate with the EPA the *kind* of repair for which liability may be imposed in the context of a particular recall. This so-called "flexibility," *see id.*, will be scant help to manufacturers who would be estopped from contesting their *liability* for making some kind of repair on older cars in future recalls should this court approve EPA's interpertation of the recall provisions in this case.

The EPA's interpretative rule, both on its face and as subsequently qualified by the agency, is clearly inconsistent with the statute. We need not wait to see the precise repair required in every future recall to declare as a general principle that the statute does not impose on manufacturers liability for repair of vehicles beyond their useful lives.

with emissions standards, it is not a "repair" at all. In essence, the EPA rule requires a *manipulation* to be performed on older vehicles at manufacturer expense. But, by the EPA's own admission, that manipulation would not *remedy a nonconformity* as the statutory language clearly contemplates.

C. *Legislative History*

Whatever doubt may remain concerning the legitimacy of the EPA's interpretation is laid to rest by a critical passage of the Act's legislative history.[59] The passage refers to a Senate version of the bill that at that time established a 50,000-mile, but no age, limitation on vehicle useful life. In discussing the recall provisions of the bill, the Senate Committee said:

> The 50,000-mile period can be assumed to be 4 to 5 years and the manufacturer should be expected to *notify* any owner of a vehicle that is *five years old or less* as to failure to continue to perform to the standard. A decision *not to require the manufacturer to repair* the vehicle could be made after notice and *after finding that the vehicle had exceeded the 50,000-mile warranty period.*[60]

This language indicates the understanding of Congress that manufacturers would not be required even to notify owners of cars that had in all probability exceeded their useful lives; *i.e.*, cars ostensibly belonging to the noncon-

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[59] Even if the statutory language appeared clear, the plain meaning rule is only a primary and not a conclusive source of understanding and must yield on occasion to other indicia of legislative intent, including legislative history. *See* Chesapeake & O. Ry. Co. v. United States, 571 F.2d 1190, 1194 (D.C. Cir. 1977); *see also* Watt v. Alaska, 451 U.S. 259, 266 & n.9 (1981); Aaron v. SEC, 446 U.S. 680, 705-08 (1980) (Blackmun, J., concurring in part and dissenting in part).

[60] S. REP. No. 1196, 91st Cong., 2d Sess. 31 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 431 (emphasis supplied).

forming class but more than five years of age at the time the manufacturer was informed by the EPA of the nonconformity would not be recalled in the first instance. Furthermore, if a car less than five years of age were recalled but found to have exceeded the 50,000-mile limitation when presented for repair, the manufacturer could be excused from liability for repair.

EPA attempts to downplay this evidence of congressional intent with two responses. First, EPA contends that the legislative history of the Senate bill is irrelevant [61] because the bill had a "fast track" recall system

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[61] The dissent also argues that the above-quoted language of the Senate Committee Report is irrelevant, *see* Dissenting Opinion at 12, but on grounds which EPA failed to raise and to which, as a result, GM has been permitted no opportunity to respond. However, the dissent's discourse on the distinctions between the Senate bill and the Act as finally adopted falls far short of establishing the irrelevance of the Senate Report. To the contrary, the extended legislative history exhumed by the dissent lends further support to the conclusion that Congress did not intend that manufacturers be held liable for repair of vehicles beyond their useful lives. Judge Wald correctly observes that the Senate bill imposed no explicit repair obligation in its class notification provision; recall of the class was effectuated once the manufacturer notified the owners of all vehicles presumed to be within their useful lives. *See id.* at 10-11; *see also* S. 4358, 91st Cong., 2d Sess. § 8 (1970), *reprinted in* 1 *1970 Legislative History, supra* note 55, at 574, 594-96 (amending § 207(d) (now § 207(c)) of the Act). Instead, the Senate version relied for a remedy upon the exercise of the bill's warranty provisions by the vehicles' purchasers in response to the class notification. *See* Dissenting Opinion at 10-11; *see also* S. 4358, 91st Cong., 2d Sess. § 8 (1970), *reprinted in* 1 *1970 Legislative History, supra* note 55, at 574, 593-94 (amending § 207(c) (now § 207(a)) of the Act). The warranty section of the bill, in turn, provided that

> [e]very new vehicle or new vehicle engine . . . shall be warranted by the manufacturer to . . . remain in conformity with [emissions] regulations for the lifetime of such vehicles or engines if properly maintained, serviced, and operated. Operation for fifty thousand miles shall be

absent in the Act as finally adopted. Under this scheme, there would have been no allowance for protracted nego-

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taken as the basis for the lifetime of a vehicle or engine under this section.

S. 4358, 91st Cong., 2d Sess. § 8 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 574, 593-94 (amending § 207(c) (now § 207(a)) of the Act).

We note first that the dissent's interpretation of this section of the bill is inconsistent with its treatment of the recall provision of the Act. Neither the warranty provision nor the recall provision contains language *explicitly* exempting the manufacturer from liability for repair of vehicles which failed to conform to emissions standards during their first 50,000 miles but, for whatever reason, were not presented for repair until they were beyond their useful lives. Were the reasoning propounded by the dissent with respect to the Act's recall provision applied with equal vigor to the warranty provision, a car owner would be free to return a 60,000-mile vehicle to the dealer and demand repair of any defect that was present (or presumed to have been present) during that vehicle's first 50,000 miles. Nevertheless, the dissent appears to recognize the absurdity of such an interpretation in the warranty context and freely concedes that "[b]ecause the warranty obligation ended when the vehicle exceeded 50,000 miles, the manufacturer would not have been required to repair a car that had exceeded the warranty mileage, even though it was a member of the 'recall' class." Dissenting Opinion at 11.

Ultimately, the dissent's dismissal of the Senate Committee Report as irrelevant rests on a totally unfounded assumption: the Conference Committee, without comment or explanation, added to the recall provision of the Senate bill a totally "*independent* recall repair obligation in addition to the warranty obligation." Dissenting Opinion at 12 (emphasis in original); *id.* at 10. In contrast to the warranty repair obligation, which limited the manufacturer's liability for repair to a vehicle's useful life, this new recall repair obligation, Judge Wald would have us believe, exposes the manufacturer to liability for repair virtually indefinitely. To realize the full extent of the liability the EPA rule would impose on a manufacturer, it is important to bear in mind that a recall class may include vehicles or engines of more than one model year. For example, the same carburetor or engine component may be used in vehicles over the course of four or five model years. *See, e.g.*,

tiation of the specifics of the recall plan and, hence, no opportunity for the sorts of administrative or manufac-

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J.A. 293 (recall of 1975-1978 Pontiacs with EGR backpressure transducers). Under the interpretation espoused by EPA and the dissent, the manufacturer would be liable for the repair of all vehicles ever produced with that component, provided a sample of defective vehicles or engines still within their useful lives could be assembled for testing. Thus, if the Pontiac engine defect, for instance, had been discovered during the fourth year of the useful lives of the 1978 model Pontiacs, *all* Pontiacs manufactured with the suspect transducer would be subject to recall. The manufacturer would have been required to repair not only the four-year old 1978 models but also the 1975 Pontiacs, which, at the time the EPA would have issued its notification of nonconformity, would have been between nine- and ten-years old. And all of these vehicles would have been several years older still had the process of approving a remedial plan consumed as much time as it did in the present recall.

One would expect such a drastic extension of the manufacturer's repair obligation to have attracted at least some debate. Certainly there were those in the Senate who believed even the limited five-year liability imposed by the warranty provision to have been excessive. *See, e.g.*, 116 CONG. REC. 33,083, 33,093 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 307-08, 330-31 (remarks of Senator Griffin); *id.* at 33,097, *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 338 (remarks of Senator Cooper); *see also* Administration's Letter to Conference Committee Recommending Certain Provisions (Nov. 17, 1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 212-13 (expressing view of executive branch that 50,000-mile warranty was "inappropriate and unrealistic in the light of known technology and experience"). Particularly in the House, whose original bill to amend the Clean Air Act contained neither a recall nor a warranty repair obligation, *see* H. REP. No. 1146, 91st Cong., 2d Sess. 11-13, 38-40 (1970); Dissenting Opinion at 12 n.8, some comment on such a sweeping new imposition of repair liability would surely have arisen.

Yet no such comment was made during either the House or the Senate debates on the Conference Committee Report; instead, the only discussion on amendments to § 207 of the Act focused exclusively on the House's acquiescence in the Senate's proposed *warranty* repair obligation, which as the dis-

turer-induced delays that would permit large numbers of vehicles to exceed their useful lives after their noncon-

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sent admits, was limited to the five-year/50,000-mile vehicle useful life. *See* 116 CONG. REC. 42,520 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 112 (House debate) (remarks of Representative Staggers); *id.* at 42,382, 42,385, *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 126, 134-35 (Senate debate) (remarks of Senator Muskie). Moreover, the comments of the House managers included in the Conference Committee Report explicitly state:

> The Senate [bill] . . . authorized the Administrator, if he determined that any class or category of vehicles or engines did not conform with applicable emission standards, to require manufacturers to notify purchasers of such nonconformity. Moreover, if a manufacturer discovered such nonconformity *during the term of any warranty* required under the Senate [bill], he was required to notify purchasers of the nonconformity and to remedy such nonconformity at no cost to the owner.
>
> *The conference substitute adopts substantially* the provisions of the House bill relating to prototype and production line testing and *the provisions of the Senate* [*bill*] . . . *relating to compliance after sale and warranty.*

H. REP. No. 1783, 91st Cong., 2d Sess. 50 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 200 (Conference Report) (emphasis supplied). No mention of any extension of a manufacturer's liability for repair of nonconforming vehicle's beyond the five-year/50,000-mile limits of the warranty period is made anywhere in the Conference Committee Report, although that Report purports to explain *all* but technical or clarifying changes made in Conference. *Id.* at 42, *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 192.

Thus, it would appear that the alterations of the language of S. 4358 made in Conference were merely "technical, clarifying, and conforming changes." *Id.* The Conference Committee changes simply made the manufacturer's liability for repair in a recall situation, originally incorporated in the warranty provision, explicit in the recall provision itself. The warranty repair obligation and the recall repair obligation are clearly coterminous, their only difference being in their triggering agents—the individual consumer in the case of warranty repairs or the agency in recalls. Both obligations are limited in duration to the five years or 50,000 miles of a vehicle's useful life.

formity had come to the attention of the EPA. Instead, all cars would have had to have been recalled within sixty days of the date that notice of nonconformity was given by EPA to the manufacturer.[62] As a result, EPA argues, "it is clear that the Senate may not have focused upon the problems caused by delays in the implementation of a recall, because substantial delays were impossible under the Senate scheme." [63]

EPA's argument fails to persuade for several reasons. First, the so-called "fast track" recall system precludes only one kind of delay—that caused by negotiations over the content of the recall plans. But EPA itself concedes that most of the delay encountered in previous recalls has not derived from protracted negotiations.[64] Months may be consumed in testing and investigating a potentially nonconforming class prior to the issuance of a recall order.[65] Considerable delay may occur while administrative and judicial appeals are exhausted.[66] Yet al-

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[62] *See* S. 4358, 91st Cong., 2d Sess. § 8 (1970), *reprinted in* 1 *1970 Legislative History, supra* note 55, at 574, 595-96 (amending § 207(d)(2) (now § 207(c)(1)) of the Act).

[63] EPA Brief at 35 n.44.

[64] EPA estimates that the "average time from recall order to owner notification is 8½ months." EPA Brief at 28 n.33: J.A. 268 & n.6. However, this computation apparently includes time consumed in administrative and judicial challenges to the recall order. *See* EPA Brief at 28.

[65] EPA approximates the average time spent in such investigations as nine months. *See* J.A. 268 & n.5.

[66] EPA provides no estimate of the average amount of time consumed in such appeals. However, the agency did note one recent recall in which nearly four years were expended in appeals:

> Of particular note is the recall of certain 1975 Chryslers ordered recalled on December 8, 1976 . . . . Although the recall was ordered relatively early in the life of the vehicles, Chrysler requested an administrative hearing on

though the "fast track" recall system would have limited the length of negotiations over remedial plans, the system would have done nothing to avoid the more substantial delays incurred in the course of investigation or appellate proceedings.[67]

Moreover, even if the "fast track" system were able to eliminate all delays encountered under the Act, this fact does not render the legislative history of the bill entirely inapposite. Perhaps the significance of the Committee Report's language [68] concerning the fate of vehicles found to be beyond their useful lives *when presented for repair* might be lessened. Yet, the absence of a possibility for manufacturer-induced delay does nothing to mitigate the

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> the Administrator's determination of nonconformity. The Administrative Law Judge upheld the determination in a decision filed on February 10, 1978. Subsequent appeals to the Administrator and this Court also resulted in decisions favorable to EPA. *Chrysler Corp.* v. *EPA*, [631 F.2d 865 (D.C. Cir. 1980)] . . . . Certiorari was denied by the U.S. Supreme Court on December 1, 1980 . . . , when few, if any, of the 208,000 vehicles subject to the recall order were still within their useful lives.

EPA Brief at 28 n.35.

[67] *See* S. 4358, 91st Cong., 2d Sess. § 8 (1970), *reprinted in* 1 *1970 Legislative History, supra* note 55, at 574, 594-96 (amending § 207(d) (now § 207(c)) of the Act) (actual use testing); *id.*, *reprinted in* 1 *1970 Legislative History, supra* note 55, at 574, 595-96 (amending § 207(d)(2) (now § 207(c)(1)) of the Act) (administrative hearings and review); *id.* § 11(b), *reprinted in* 1 *1970 Legislative History, supra* note 55, at 612, 619-20 (inserting § 308 (now § 307(b)) of the Act) (judicial review); Administrative Procedure Act § 10 (presently codified as amended at 5 U.S.C. §§ 702, 704 (1982)) (judicial review).

[68] "A decision not to require the manufacturer to repair the vehicle could be made after notice and after finding that the vehicle had exceeded the 50,000-mile warranty period." S. REP. No. 1196, 91st Cong., 2d Sess. 31 (1970), *reprinted in* 1 *1970 Legislative History, supra* note 55, at 431.

weight of the report as evidence that Congress did not intend manufacturers to be responsible for the recall of vehicles likely to have exceeded their useful lives *at the time the EPA notifies the manufacturer of nonconformity.* Even if there were *no* delay between EPA notice of nonconformity and manufacturer notification of vehicle owners, cars already beyond their useful lives would not be subject to recall by the terms of the report's language.[69] Yet the May 30 rule would require manufacturers to recall such vehicles.

Indeed, the most that can be said for the import of the "fast track" recall system in the Senate bill is that it indicates the possibility that Congress failed to appreciate and to provide relief for the delays that might arise in the recall process when the "fast track" system was removed. However, if the agency wishes to fill in interstices created by a possible congressional failure to anticipate the consequences of amendments to the statutory scheme, the proper recourse is a legislative, not an interpretative. rule.[70] An interpretative rule may neither

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[69] "The 50,000-mile period can be assumed to be 4 to 5 years and the manufacturer should be expected to *notify* any owner of a vehicle that is *five years old or less . . . .*" *Id.* (emphasis supplied).

Of course, this language, standing alone, *might* permit an interpretation under which the manufacturer could be held liable for repair of vehicles which were within their useful lives at the time EPA notified the manufacturer of nonconformity but had exceeded their useful lives by the time they were presented for repair. Since EPA has not put forward such an interpretation, we have no occasion to rule on it. We do note, however, that legislative rulemaking might be required to resolve a number of implementation problems (*e.g.*, a method for determining when a given car exceeded its useful life) before such an interpretation could be given effect.

[70] *See* Chamber of Commerce v. OSHA, 636 F.2d 464, 469-70 (D.C. Cir. 1980).

expand nor contract the statutory form and substance;[71] it must simply construe, without supplementing, the terms of the Act.[72]

EPA also argues that any inference to be drawn from the language of the Committee Report concerning the manufacturer's duty to notify and to repair vehicles exceeding their useful lives must be counterbalanced by other segments of the legislative history evidencing Congress' concern that the industry produce cars capable of meeting emissions standards throughout their actual lives.[73] For example, Senator Muskie, one of the bill's sponsors, remarked:

> Throughout discussions with the industry over the past 6 or 7 years, that is what they were stating, 50,000 miles. They do not consider that technology would be effective or worthwhile, in terms of cost to the consumer, unless it meets the 50,000-mile test. So we are asking for that, because unless automobiles will perform for a practical proportion of their life, meeting standards initially may not be worthwhile. Fifty thousand miles is not all their life, 100,000 miles being nearer to a measure of the life of a motor vehicle, but we have taken 50,000 miles. . . . and we have used that 50,000-mile test on performance.[74]

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[71] *See* Energy Consumers & Producers Ass'n v. Department of Energy, 632 F.2d 129, 142 (Temp. Emer. Ct. App. 1980).

[72] *Chamber of Commerce*, 636 F.2d at 469.

[73] *See* EPA Brief at 30-33.

[74] 116 CONG. REC. 33,094 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 332.

During debate on the 1977 Clean Air Act Amendments, Senator Muskie commented:

> The actual life of a car is more than 50,000 miles. We all know that. It approaches 100,000 miles, I think, increasingly, but it was our feeling that a 50,000-mile warratny would put sufficient pressure on the manufacturers

The Committee Report also observed:

> The [Senate] Committee hopes that, if the motorist complied with [the manufacturer's maintenance] instructions, emission controls would not deteriorate after 50,000 miles to the extent that ambient air quality would be impaired. The Committee further expects the manufacturer to endeavor to either improve the quality control of emission systems or explore better ways to assure compliance beyond 50,000 miles of use.[75]

EPA's reliance on these passages of the legislative history is misplaced. Neither GM nor this court have any doubt that Congress believed that the actual life of an automobile is closer to ten years and one hundred thousand miles than it is to five years and fifty thousand miles. Nor do we doubt that Congress hoped that, by rigidly enforcing emissions standards during the five-year/fifty thousand-mile statutory useful life, emissions performance would be improved throughout the balance of the car's actual life. Nevertheless, Congress intentionally limited the duration of a manufacturer's *liability* for a vehicle's conformity to standards to a five-year/fifty thousand-mile period in response to industry representations that the technology could not be guaranteed for a longer period.[76] It is not for the agency to impose

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> to meet the standards so that if they met them for 50,000 miles, the chances were that the standards would be met pretty closely for the car during all of its useful life, even if it extended beyond 50,000 miles.

122 CONG. REC. 24,302 (1976), *reprinted in* 6 SEN. COMM. ON ENVIRONMENT & PUB. WORKS, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 5145 (1978).

[75] S. REP. No. 1196, 91st Cong., 2d Sess. 30 (1970), *reprinted in* 1 *1970 Legislative History*, *supra* note 55, at 430.

[76] The Senate Committee Report noted:

> The manufacturers informed the Committee that they would not be able to guarantee conformity with emissions

under the guise of "interpretation" a more stringent requirement that Congress considered and rejected.

> standards for the anticipated 10-year life of a vehicle. The committee bill provides that 50,000 miles would be *the maximum* that a vehicle would be required to conform to the standards for which it was certified.

Id. (emphasis supplied).

The dissent attempts to offset the weight of these unequivocal indications of congressional intent to limit manufacturer liability to the five-year/50,000-mile vehicle useful life by pointing to a series of ambiguous remarks in the legislative history. These hyperbolic references assert EPA's power under the recall provision to order the repair of "an entire 'model or class,'" "a given model run," or "the entire lot" of vehicles. *See* Dissenting Opinion at 6-8.

These statements accurately reflect the general rule. In an ordinary recall, the EPA discovers the defect sometime during the first two years of a model's life, orders the entire class or model recalled, and within eight months the vehicle owners are notified of the nonconformity by the manufacturer and are requested to bring their cars to the dealers for repair. *See supra* notes 40, 64; *infra* note 77. There are, however, obvious exceptions to the general rule which none of the passages cited by the dissent purports to address. For example, the recall provision explicitly exempts the manufacturer from liability for repair of vehicles not "properly used and maintained." *See* Clean Air Act § 207(c)(1), 42 U.S.C. § 7541(c)(1) (Supp. V 1981). Notwithstanding the EPA's general ability to order the manufacturer to repair an entire model or class, no one would argue that the EPA has the authority to order the manufacturer to repair vehicles that have not been properly used or maintained. Similarly, our analysis of both the language of the Act and its legislative history demonstrates that vehicles which have exceeded their useful lives are not part of the class subject to recall and repair under the Act.

Generalized statements, such as those cited by the dissent, which make no attempt to take account of exceptions, shed little light on the proper resolution of this case which clearly poses an exceptional circumstance: a substantial number of cars beyond their useful lives when presented for repairs. *See supra* note 40. Certainly such generalizations do not negate

CONCLUSION

We are not insensitive to the fact that our holding may impede the enforcement of emissions standards even for cars within their useful lives at the time the EPA first notifies the manufacturer of the nonconformity of a vehicle or engine class. Nonconformity may be discovered only late in a vehicle's useful life,[77] and only an unusually uninventive lawyer will be unable in the context of today's backlogged court dockets to prolong administrative and judicial appeals for at least several years. The recall system may be rendered useless if the combination of belated identification of nonconformities and protracted negotiations and appeals combine to place all or most vehicles involved in a recall beyond their useful lives once owner notification commences.[78]

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the import of passages elsewhere in the legislative history which specifically address the limitations on the manufacturers' recall repair liability. *Generalia specialibus non derogant. Cf.* E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 167 (1940) (special provisions of statutes control when in conflict with general provisions); J. HURST, DEALING WITH STATUTES 59-61 (1982) (exceptions place general provisions in context).

[77] According to EPA estimates, vehicles involved in recalls average 20,000 miles of use at the time of the recall order. *See* J.A. 268 n.4.

[78] By acknowledging this "worst case" scenario, we do not, however, intimate that the EPA will be totally hamstrung in its efforts to enforce vehicle emissions standards. To begin, the EPA can minimize the degree of delay by expediting agency response at each stage of the administrative process. The agency can also seek early judicial enforcement of its recall orders when confronted with recalcitrance or foot-dragging on the part of manufacturers. *See* Clean Air Act §§ 203(a)(4)(B), 204, 205, 42 U.S.C. §§ 7522(a)(4)(B), 7523, 7524 (Supp. V 1981).

Moreover, however significant the recall apparatus may be, it is not the only tool at EPA's disposal capable of inducing manufacturers to design vehicles which conform to emissions

However, this is a difficulty which can only be redressed by congressional intervention, or at a minimum, legislative rulemaking with attendant notice and comment procedures.[79] "It is not for an administrative

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standards throughout their useful lives. The Act provides a number of alternative enforcement mechanisms; for example:

1. Section 206(a) requires EPA to certify, on the basis of extensive testing of prototypes, that each new vehicle produced will conform to emissions standards for five years or 50,000 miles. No manufacturer may produce or market vehicles not covered by such a certificate. 42 U.S.C. § 7525(a) (Supp. V 1981).

2. Section 206(b) authorizes the EPA to conduct production line testing to determine whether vehicles being manufactured will conform to emissions standards for 50,000 miles. Suspension of the certificate of conformity is authorized if vehicles fail such tests. 42 U.S.C. § 7525 (b) (Supp. V 1981).

3. Section 207(a) requires a manufacturer to warrant that each vehicle sold is designed and built to conform to emissions standards and that its materials and workmanship are free from any defect which will cause it to fail to conform to emissions standards during its useful life. 42 U.S.C. § 7541(a) (Supp. V 1981).

4. Section 207(b) further requires a manufacturer to warrant that performance of major emissions components of each vehicle will conform to emissions standards for five years or 50,000 miles. 42 U.S.C. § 7541(b) (Supp. V 1981).

5. Sections 203(a) and 205 authorize imposition of penalties of up to $10,000 per vehicle against a manufacturer which violates any of these requirements or which fails to perform warranty repairs. 42 U.S.C. §§ 7522(a), 7524 (Supp. V 1981).

[79] We note, for example, that the Administrator has substantial discretion in defining by regulation the useful lives of vehicles under the Act. *See* Clean Air Act § 202(d), 42 U.S.C. § 7521(d) (Supp. V 1981). Perhaps a legislative regulation providing that the useful life of vehicles in a class be tolled at the time the Administrator notifies the manufacturer

of the nonconformity of that class would protect the recall system from manufacturer-induced delays.

The dissent expends considerable effort attempting to demonstrate the infeasibility of this suggestion. *See* Dissenting Opinion at 3 n.3, 14-21. The short answer seems obvious: if this particular proposal will not work, then the agency will have to devise an alternative regulatory solution, make do with presently available enforcement mechanisms, *see supra* note 78, or turn to Congress for remedial legislation. The failure of one regulatory alternative does not license the agency to disregard the limits Congress has imposed on its authority.

We cannot, of course, prejudge the validity of a regulation that is not before this court. We would, however, point out that a tolling provision is not as clearly precluded by the statute, nor by the reasoning of our opinion, as the dissent would have us believe. It is true that Congress has fixed the useful life of light-duty vehicles, such as automobiles, at five years or 50,000 miles. *See* Clean Air Act § 202(d)(1), 42 U.S.C. § 7521(d)(1) (Supp. V 1981); Dissenting Opinion at 3 n.3. That the EPA may not alter that limitation by regulatory fiat is the point of our opinion. However, § 202(d) directs the Administrator to "prescribe regulations under which the useful life of vehicles may be determined for purposes of . . . section 7541 of this title." 42 U.S.C. § 7521(d) (Supp. V 1981). This language *may* be sufficiently elastic to permit the EPA to promulgate regulations prescribing *how* the five-year/50,000-mile useful life will be measured for recall purposes. If so, a vehicle's age and mileage could be tolled whenever the EPA issues a recall order for vehicles of its class.

The dissent suggests that even if a tolling provision were permissible under the statute, such a regulation would suffer the same flaw as does the rule before us in this case—"[e]ither one would require the repair of vehicles beyond the age limits set by Congress . . . ," *i.e.*, vehicles to which emissions standards no longer apply. Dissenting Opinion at 18; *see id.* at 14-21. This contention is difficult to comprehend. Under a tolling provision, a vehicle's constructive life, not its actual life, would govern its eligibility for recall and repair. Thus, if a car were two-years old when the EPA issued a recall order, but was six-years old by the time the recall was ultimately put into effect by the manufacturer, the vehicle's constructive age would be two years. Such a vehicle

agency . . . to preempt Congressional action or to 'fill in' where it believes some federal action is needed." [80] Although the May 30 rule may have been a well-intentioned response to an obvious and precipitous loophole in the statutory framework, the rule, and as a result the GM recall order, exceeded the bounds of reasonable statutory interpretation. Therefore, we vacate both the May 30 rule and that part of the June 23, 1980 order that found that GM had failed to submit a remedial plan with respect to 1975 Cadillacs beyond their useful lives when presented for repair.[81]

So ordered.

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would be subject to the same standards that applied to it at (actual) age two.

We offer the suggestion of a tolling provision, not out of a sense that it is the only way—or even the best way—for the agency to administer the recall provision. Rather, we are sympathetic to the predicament of the agency which may be hampered in its exercise of its recall powers should manufacturers take advantage of this loophole in the Act to evade their recall repair obligations. Ultimately, however, it is not the responsibility of this court to provide "a principled exception" to a limitation established by Congress. *See* Dissenting Opinion at 20. If, indeed, a "statutory straightjacket" is involved in this case, *see id.*, it is one into which the EPA has been laced by Congress, not by this court. It is to Congress that the agency will have to turn for relief.

[80] Office of Consumers' Counsel v. Federal Energy Regulatory Comm'n, 655 F.2d 1132, 1152 (D.C. Cir. 1980).

[81] Even if it were allowed to stand, the GM order would by now be virtually moot. The class as a whole is nine-years old, and, by EPA's own admission there is little likelihood that owners would respond to a recall order at this point. *See* EPA Brief at 29 n.37; *see also* J.A. 298.

WILKEY, *Circuit Judge*, concurring: I concur in Judge Bazelon's opinion for the court. The issue posed to us is one of statutory interpretation, not factual assessment or policy judgment. We are agreed that EPA interpreted the statute erroneously, and that General Motors' interpretation is likewise wrong. The court, however, should not be secretive; we should go forward and give our interpretation of the statute instead of sending the question back to the agency to make another guess.

At the outset it may be helpful to list the possible alternative positions. The question is how the class of cars to be recalled and repaired is to be described and defined. Four interpretations of the statute appear to be possible. If X, Y, Z, and A represent certain quanta of cars, then:

1. X = the number of cars which have not passed their useful life on the date when EPA sends its notice to the manufacturer.

2. X minus Y = the number of cars on the date when the manufacturer sends notice to the car owners.

3. X minus Y minus Z = the number of cars on the date when the individual car is presented at the shop in accordance with the recall notice.

4. X plus A = all of the class of cars defined in the EPA recall notice, irrespective of whether they have passed their useful life at the time they are presented for repair.

The last category, X plus A, represents all the possible cars in the class, and is EPA's position, which is rejected by the court. X minus Y minus Z represents General Motors' position, *i.e.*, the recall and repair obligation only attaches to a car which, when presented at the shop, has not exceeded its useful life. This argument is rejected by the court.

X, the number of cars which have not exceeded their useful life at the time the EPA sends notice of its decision to the manufacturer, represents what I think is the proper interpretation of the statute.

Section 207(c) of the Clean Air Act reads in relevant part as follows:

> If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used do not conform to the regulations prescribed under section 7521 of this title, when in actual use throughout their useful life . . . he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer.[1]

A proper interpretation of this passage requires us to work backward from the last sentence. The remedial plan must provide for the repair of "any such vehicles or engines." "[S]uch vehicles or engines" refers us to the last clause of the previous sentence: "the vehicles or engines with respect to which such notification is given." By simple substitution we see that the remedial plan must provide for the repair of any vehicles or engines with respect to which notification of nonconformity is given.

There can be no "nonconformity" by automobiles which, at the time of the EPA notice, have passed their useful life. As the court's opinion makes clear, there are no emission standards for cars beyond their useful life. Congress defined useful life as 50,000 miles or five years,

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[1] *As amended*, 42 U.S.C. § 7541(c).

whichever comes first. Therefore, there can be no nonconformity with emissions standards for an automobile which has passed either of these milestones, for there are no standards with which to conform. Notification of nonconformity can only be given to manufacturers with regard to cars which are obligated to conform to emission standards, *i.e.*, those cars which have not passed either 50,000 miles or five years.

When the EPA orders relief to be provided, every car owner who at that moment is entitled to relief ought always to be entitled to it. The right of an owner to have his car corrected should not be lost simply because of delays either by the manufacturer or, more likely, by the agency itself in working out a remedial plan—as occurred in this case.

This interpretation of the statute would, of course, impose some obligations on manufacturers to repair cars that have passed their useful life by the time they are presented for repair. It is, however, perfectly logical to require that an administrative determination of "nonconformity" be made only for those cars that are within their statutorily defined useful life at the time of the agency's notice action, and yet to insist that once the agency makes the determination and gives notice, the manufacturer's obligation to repair those particular vehicles is unaffected by a subsequent passage of time or an increase in mileage.[2]

The practical question of determining whether a car presented for repair work was within its useful life on the date of the EPA notice, even though on the date of presentation to the shop it may be over 50,000 miles or five years, is simple enough. The age of the car on the

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[2] The dissent fails to understand that an agency determination of nonconformity, which turns on the car's age or mileage at the time of notice, can nonetheless trigger a *fixed* repair obligation. *See* Dissent op. at TAN 13-14.

date of the EPA notice can be determined by looking at the car's bill of sale. To determine the car's mileage on the date of the EPA notice, the agency can employ a simple rule that a car's mileage is presumed to increase uniformly throughout its period of ownership. It then becomes a high school mathematical problem to affix the mileage of the car on the date of the EPA notice of recall.

This interpretation of the statute is supported by the rather complex legislative history, which I do not think we need to pursue here.[3] The face of this portion of the statute gives us a reasonable interpretation, for which the implementation [4] is as simple as I have outlined.[5]

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[3] *See* Court opinion, TAN 59-76. While I agree with Judge Bazelon's analysis of the legislative history as the best possible out of a murky series of legislative events, Judge Wald seems convinced by a different and strained interpretation supporting her idea of what the EPA should do. Why not just look at the statute? To me the words convey a simple, definite description of an effective enforcement scheme not found in their foggy legislative ancestry.

[4] *Cf.* Court opinion, note 79.

[5] To my interpretation Judge Wald's heavy criticism cannot possibly apply:

> [The panel's decision] permits automobile manufacturers to circumvent in large part or even altogether section 207's recall and repair obligations through a strategy of engaging in prolonged litigation.

Dissent op. at 1.

To this she compares Judge Bazelon's frank acknowledgment of administrative difficulties if EPA proceeds along some optional lines. *See* Court op. TAN 78. By my interpretation of the statute there could never be any incentive for prolonged delay by the manufacturer, nor would any car involved in a recall be exempted from the repair obligation.

WALD, *Circuit Judge*, dissenting: The panel's decision today invalidates an interpretative rule of the EPA that finds no contradiction, and indeed much support, in the language, purpose, and legislative history of the Clean Air Act Amendments of 1970. In so doing, it oversteps appropriate bounds for judicial interference with reasonable statutory interpretation by an enforcement agency. Disturbingly, it permits automobile manufacturers to circumvent in large part or even altogether section 207's recall and repair obligations through a strategy of engaging in prolonged litigation.

To repeat a frequent incantation of this court, "[i]t is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons." *Chrysler Corp.* v. *EPA*, 631 F.2d 865, 884 (D.C. Cir.) (quoting *Brewster* v. *Gage*, 280 U.S. 327, 336 (1930)), *cert. denied*, 449 U.S. 1021 (1980). The majority opinion itself refers to the statutory language of section 207 as "ambiguous," and the EPA's interpretation in this case is an eminently "practical" one. Indeed, this court recently reviewed an EPA interpretation of the section 207 recall authority and observed that "[a]lthough this court has the duty . . . to 'decide all relevant questions of law,' we recognize that the special expertise of the EPA in interpreting the legislation which it is called upon to administer requires that we defer to the judgment of the Agency when that judgment is reasonable and is consistent with the language and purpose of the legislation." *Id.* (quoting the Administrative Procedure Act, 5 U.S.C. § 706). Therefore, in the absence of contradictory statutory language or a reasonably clear "contrary indication in the legislative history," *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980), an interpretative rule that "on its face appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme," *id.*, must be

upheld.[1] I can find no legitimate reason for avoiding that mandate here.

THE PANEL BY ITS OWN ADMISSION EFFECTIVELY GUTS SECTION 207

The Clean Air Act's unequivocal purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The EPA rule struck down by the majority obviously effectuates this purpose. When the EPA discovers a defect in a class of cars that results in excessive pollution during their useful lives, the rule assures that the manufacturer must fashion a remedy to fit the violation: the remedial plan must include "all properly used and maintained nonconforming vehicles in the subject class regardless of their age or mileage at the time of repair." 45 Fed. Reg. 36,396, 36,397 (May 30, 1980).

This interpretation makes good practical sense because whatever their age at the time of the actual recall, nonconforming cars have been riding the roads for years in violation of pollution standards. Cars that are nonconforming during their useful lives do not cease to be

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[1] Courts should pay special deference to the agency's interpretation when, as here, (a) the agency is interpreting a statute it is charged with administering, (b) the interpretation has been consistently adhered to, *see infra* note 5, (c) Congress has acquiesced to the administrative interpretation, *see infra* at 8-9, and (d) the statute gives the agency substantial discretion in administering and designing an enforcement scheme, *see* 42 U.S.C. § 7541(c)(1), (2). *See* National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 166-69 (D.C. Cir. 1982) (enumerating "[t]he usual factors . . . (regulatory agency, consistency, contemporaneous construction, expertise, congressional acquiescence, thoroughness) [that] generally support giving great deference to EPA's interpretation"); Wilderness Soc'y v. Morton, 479 F.2d 842, 864-67 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973).

a pollution hazard thereafter; in fact, it is sensible to presume that they are more likely afterward to be a hazard than conforming cars. To the degree they can be altered to decrease their pollution potential even after their useful lives, the public is benefitted. By the same token, to the degree they elude correction both during and after their useful lives, the public is cheated.[2]

Indeed, the majority candidly admits that its invalidation of the rule may "render[] useless" the EPA recall system. Maj. Op. at 39. In the majority's words, "only an unusually uninventive lawyer will be unable in the context of today's backlogged court dockets to prolong administrative and judicial appeals for at least several years," with the result that "all or most vehicles involved in a recall" will be exempted from the repair obligation.[3]

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[2] The EPA explained with specificity the purposes of section 207 when the interpretative rule was promulgated, and warned that those purposes could be undermined in the absence of the rule:

> The recall program has two objectives: 1) To assure that manufacturers repair vehicles which are exceeding the emission standards if maintained and used and the nonconformity occurs within the useful life of the vehicles, and 2) to encourage manufacturers to build durable emission-related components to assure that vehicles will not manifest excessive emissions during their useful lives. Both of these objectives are frustrated by an interpretation of useful life which limits manufacturers' liability only to vehicles which are within their useful life at the time of repair.

45 Fed. Reg. at 36,397.

[3] The majority suggests that EPA may redress this "difficulty" through the adoption of "a legislative regulation providing that the useful life of vehicles in a class be tolled at the time the administrator notifies the manufacturer of the nonconformity . . . ." Maj. Op. at 40 n.79. However, contrary to the majority's belief that "the Administrator has substantial discretion in defining . . . the useful lives of vehicles," *id.*, the statute appears to limit that discretion to

Id. Certainly, a statutory construction which acknowledgedly produces such a bizarre result should be viewed with great skepticism. Only recently we stressed, "[w]e cannot interpret section 207 'in a manner which runs counter to the broad goals which Congress intended it to effectuate.'" *Chrysler Corp. v. EPA*, 631 F.2d at 888 (quoting *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968)). The panel has done so here.[4]

THE PANEL OPINION IS NOT CONSISTENT WITH THE LANGUAGE, HISTORY, OR PAST INTERPRETATION OF SECTION 207

The language of section 207 offers no firm ground for invalidating the EPA interpretative rule. The statute requires manufacturers to submit remedial plans for "vehicles or engines with respect to which . . . notification is given," and directs the EPA Administrator to give such notification regarding a "class or category of vehicles or engines," a substantial number of which exhibited nonconformity during their useful lives. 42 U.S.C. § 7541(c)(1). Thus, EPA reasonably interpreted the statute to require the manufacturers to include a car in their remedial plans if (1) a substantial number of cars exhibit nonconformity during their useful lives, and (2) the car is a member of that class. In this case, an estimated 68% of the automobiles in the class were exceeding emission standards during their lifetimes.

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exclude "light duty vehicles and light duty engines." 42 U.S.C. § 7521(d)(1); *see* Harley-Davidson Motor Co. v. EPA, 598 F.2d 228, 230 (D.C. Cir. 1979) (Bazelon, J.). Passenger cars, of course, are light duty vehicles.

[4] As the EPA, when issuing the interpretative rule, emphasized: "interpreting section 207(c)(1) as imposing a useful life limitation on vehicles eligible for repair under a remedial plan could severely limit the number of nonconforming vehicles repaired pursuant to recall orders, could seriously impact ambient air quality, and would frustrate the intent of Congress." 45 Fed. Reg. at 36,398.

EPA's class-based interpretation of section 207 enjoys precedential support. This court, in one of the few judicial cases to construe the recall provision, observed that "[u]nlike the discovery and cure of nonconformity of individual vehicles under the warranty provisions, the remedy at this stage is recall of the *entire class* of vehicles in order to correct the design, material, or workmanship defect . . . ." *Chrysler Corp.* v. *EPA*, 631 F.2d at 868 (emphasis in original). Moreover, the remedial plans approved by EPA in the past have uniformly extended to all vehicles or engines in the recall class.[5]

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[5] The majority attempts to make light of the EPA's historical adherence to its current interpretation. The majority asserts that the EPA interpretation has only "a lifespan barely exceeding one year" because the sole *controversy* over the interpretation occurred in 1979. But, as EPA observed when it issued its interpretative rule, "[i]n the past, manufacturers have not conditioned a vehicle's eligibility for recall repair . . . on the basis of the vehicle's age or mileage." 45 Fed. Reg. at 36,397. Rather than diminishing the rule's status as a longstanding EPA interpretation, the absence of any prior controversy over the repair of cars past their useful lives demonstrates the reasonableness of EPA's interpretation of its own regulatory scheme. *See, e.g.*, Esquire, Inc. v. Ringer, 591 F.2d 796, 801 (D.C. Cir. 1978) (Bazelon, J.) (administrative interpretation deserves "controlling weight," particularly when it "has been consistently followed for a significant period of time"), *cert. denied*, 440 U.S. 908 (1979); DeLano v. United States, 393 F.2d 517, 521 (Ct. Cl. 1968) ("A strong indication of the reasonableness of that [administrative] construction is the fact that [the regulated parties] never challenged it" even though it was "consistently maintained by the agency."). Apparently, virtually every manufacturer engaging in a recall has voluntarily included older cars in its own remedial plans.

The majority mistakenly claims that "manufacturers in previous recalls have failed to raise the question of liability for repair of cars beyond their useful lives *because the involvement of such vehicles in the recalls has been de minimis*." Maj. Op. at 13 n.40 (emphasis in original). The majority has lost sight of the facts. Despite the majority's view

The legislative history similarly supports EPA's interpretative rule. The Report of the Senate Public Works

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that "virtually all" recalls involved "tiny percentage[s] of older cars," *id.*, in six out of the fifteen recalls described in detail in the record, *see* J.A. at 278-96, the EPA issued a recall notice to the manufacturer 34-55 months after the cars were on the market. Under EPA's method of calculating the percentage of cars recalled that were beyond their useful lives, *see* J.A. at 275 (endorsed by majority at Maj. Op. at 13 n.40), these recalls involved large quantities of older cars. For example, the Pontiac recall, initiated in 1979, involved 1975 model year cars, *54%* of which were beyond their useful lives. *See* J.A. at 293. Moreover, almost *30%* of the 1976 Pontiacs involved in that recall had exceeded their useful lives at the time of manufacturer notice. Similarly, in 1978 EPA initiated a recall that included 1975 Fords, approximately *28%* of which had exceeded their useful lives. *See* J.A. at 289. Also, in 1978 the EPA began a recall that included 1974 AMC cars sold in California, approximately *56%* of which were beyond their useful lives. *See* J.A. at 291-92. Any manufacturer who "prophetically foresaw" the majority's position, Maj. Op. at 13 n.40, believing these recalls exceeded the legal scope of coverage, could reasonably have been expected to make an objection.

At least three other recalls included substantial numbers of older cars. *See* J.A. at 280 (1974 Pontiacs; approximately 22% beyond useful lives); J.A. at 288 (1975 Fords; approximately 16% beyond useful lives); J.A. at 296 (1977 Buicks; approximately 28.5% beyond useful lives). The majority objects that some of the recalls mentioned herein "were incomplete at the time the record in this case was submitted (thus leaving the court without information concerning whether 5/50 limitations were ultimately imposed)." Maj. Op. at 13 n.40. Only two of the recalls mentioned—the 1977 Buick recall, and the AMC recall—fit this description. In both cases, the manufacturer had already submitted a remedial plan without asserting the 5/50 limitation. *See* J.A. at 291-92, 296. Moreover, the EPA had already *approved* the AMC remedial plan as to six-cylinder vehicles. *See* J.A. at 291.

Finally, the majority argues that "even if 20% of the cars in the class were beyond their useful lives at the time of owner notification, . . . a 20% response rate could be expected for those cars, [and] only 4% of the cars presented for repair

Committee—upon which the majority heavily relies—refers to the recall of an entire "model or class" of vehicles or engines. S. Rep. No. 1196, 91st Cong., 2d Sess. 29 (1970). The Senate Committee bill designed two methods for EPA to assure in-use compliance with emission standards. First, after the development of a "quick test" method, the EPA could test the continuing compliance of "individual vehicles on the road." *Id.* Alternatively, the EPA could conduct more intensive examinations of "representative sample[s] of a model or class," and, after a finding of classwide noncompliance, EPA "could require the manufacturer to recall that model or class . . . ." *Id.*; *see id.* at 111 (language of S. 4358 § 207) (If EPA finds that "statistically representative samples of any class or category of vehicles or vehicle engines . . . do not conform," then all "vehicle engines included within the class or category" should be notified); *id.* at 62-63 (section-by-section analysis) after the EPA "discovers defects through testing" of a class of

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could be expected to be beyond their useful lives." Maj. Op. at 13 n.40. Thus the majority declares that even 20% of the recall class is "*de minimis*." Such statistical sport, of course, ignores the fact that the manufacturer incurs heavy costs—both financial and as to good will—simply by issuing its *notice* to owners. Moreover, under the majority's reasoning virtually no recalls could involve a significant percentage of older vehicles. As time goes by, the percentage of older cars in the recall class rises, *see* J.A. at 275, but the response rate declines commensurately, *see* J.A. at 298. In fact, following the majority's reasoning, GM had no good reason to raise its challenge in this case. At the time of the EPA notice, only approximately 13.5% of the Cadillacs in the recall class had exceeded their useful lives. At the time that GM first raised the 5/50 objection, a 35% response rate could have been expected. *See* J.A. at 298. Accordingly, following the majority's methodology, only 4.7% of the older Cadillacs in the recall class would actually have been repaired. Yet in this case the manufacturer saw fit to pursue this challenge; I think it reasonable therefore to believe that other manufacturers would have done likewise in the past.

vehicles or engines, it "shall order the manufacturer to notify . . . purchasers *of the defect*") (emphasis added).[6]

Furthermore, when Congress revisited section 207(c) in 1977, the discussion assumed that the recall provision extended to all member vehicles or engines of the nonconforming classes. *See, e.g.*, H. Rep. No. 294, 95th Cong., 1st Sess. 497 ("if a substantial number of systems fail during their on-the-road operation, the EPA can recall the entire lot for repair at the manufacturer's expense"); *id.* at 498 (noting the possibility of "a recall of all of that model vehicle or engine type"); 6 Environmental Policy Division of the Congressional Research Service of the Library of Congress for the Comm. on Environment and Public Works, 95th Cong., 2d Sess. 4540 (1978) (preliminary statement of Sen. Bentsen) ("section 207(c) authorizes the Agency to require the automaker to recall *a given model run for needed repairs* if the Agency determines that a substantial number of that model or engine type do not conform to the standards when in actual use") (emphasis added); *id.* at 1220 (preliminary statement of Sen. Riegle) ("If a substantial number of systems fail during their on-the-road operation, the EPA can recall the entire lot for repair at the manufacturer's expense"). Given these indicia of the congressional understanding of section 207(c), and the contemporaneous administrative policy (as evidenced by manufacturers' remedial plans, *see supra* at 5), it is reasonable to assume that Congress reaffirmed the EPA's understanding of its recall authority when it revisited

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[6] The majority appears to believe that the exemption excluding vehicles not "properly used and maintained" from the manufacturer's recall repair obligation somehow undercuts the EPA's class based approach. *See* Maj. Op. at 38 n.76. This exemption—unlike the exemption the majority creates—is established by express statutory language. *See* 42 U.S.C. § 7541(c)(1). The majority neglects the significant difference between statutory language and judicial innovation.

and ratified the recall provision in 1977. There is not a shred of evidence to the contrary.

The majority, nonetheless, believes it has found a stunning piece of legislative history that "la[ys] to rest" any doubt that the Congress intended to exclude from the recall remedy cars that "have exceeded the 50,000-mile limitation when presented for repair . . . ." Maj. Op. at 28-29. The full passage reads:

> The Committee also recognizes the difficulty in any recall provision of notifying the owners of vehicles. The burden would be placed on the manufacturer to notify both the initial and subsequent purchasers of vehicles. The Committee expects that the manufacturer would not only depend on the files of the franchise dealer, but would, to the extent practicable, use State motor vehicle department registration files to obtain the names and addresses of subsequent purchasers of cars. By establishing a 50,000 mile, no year lifetime for the purpose of warranty, the Committee did not intend to relieve the automobile manufacturers of their responsibility to notify owners of older cars. The 50,000-mile period can be assumed to be 4 to 5 years and the manufacturer should be expected to notify any owner of a vehicle that is five years old or less as to failure to continue to perform to the standard. A decision not to require the manufacturer to repair the vehicle could be made after notice and after finding that the vehicle had exceeded the 50,000-mile warranty period.

S. Rep. No. 1196, *supra*, at 31. As the majority notes, the report deals with an earlier and different version of section 207 from the one ultimately enacted. The pertinent section of the Senate bill then being considered by the Committee defined "useful life" solely in terms of the 50,000 mileage limit (unlike the final act, it imposed no five year limit). Maj. Op. at 28; *see* S. Rep. No. 1196, supra, at 110 (section 207(c) of S. 4358). The

majority overlooks, however, another much more significant difference between the Senate bill and the final enactment.

The Senate bill did *not* provide for *any* recall repair to correct noncompliance with emission standards; it provided only for the warranty repair obligation. Section 207(d)(2) of the bill merely directed the EPA to "order the manufacturer to provide prompt notification . . . [to] purchasers of all . . . vehicles or vehicle engines included in the class or category" that the EPA, through testing of "statistically representative samples," had found to be out of compliance with the emission standards. S. Rep. No. 1196, *supra*, at 111. Once the purchaser received such a notice, he could have sought repair at the manufacturer's expense under the warranty that was mandated by section 207(c) of the bill. *See id.* at 110. In the final enactment, by contrast, the recall provision includes an *independent remedial obligation*: a class of cars, discovered by EPA testing to be out of compliance, must "be remedied at the expense of the manufacturer." 42 U.S.C. § 7541(c)(1). This obligation arises out of the manufacturer's separate duty in a recall to formulate and follow an adequate remedial plan. *Id.* This obligation does not arise out of the warranty requirements, under which a manufacturer must guarantee the design and performance of the emission control systems. *See id.* § 7541(a)(1).

The passage from the Senate Report, relied upon so heavily by the panel, must therefore be read in conjunction with the more limited recall provisions in the bill then under consideration. In that context, the passage deals primarily with the difficulty placed on the manufacturers by section 207(d) of the bill—the "recall" section that requires manufacturers merely to *notify* purchasers of a class of vehicles or engines. As to that notice, the report says only that "[b]y establishing a 50,000 mile, no year lifetime for the purpose of warranty,

the Committee did not intend to relieve the automobile manufacturers of their responsibility to notify owners of older cars." S. Rep. No. 1196, *supra*, at 31. The meaning of this delphic sentence may never be entirely clear, but a reasonable interpretation is this. The 50,000 mile lifetime provision, of course, was found in the *warranty* section of the bill. *See id.* at 110 (section 207(c) of S. 4358). The sentence, therefore, was intended to make clear that "recall" notices, to the greatest extent practicable, should be sent to all owners of vehicles or engines in the test class that might conceivably have been eligible for repair under the warranty provision. The final sentence in the passage made clear that the "recall" notice did not automatically entitle its bearer to repair at the manufacturer's expense. Because the warranty obligation ended when the vehicle exceeded 50,000 miles, the manufacturer would not have been required to repair a car that had exceeded the warranty mileage, even though it was a member of the "recall" class.

At the same time, the Committee recognized that the notice requirement could have created practical difficulties for manufacturers in locating the buyers of older cars, which might have traded hands numerous times.[7] The Committee Report accordingly suggests that manufacturers consult "[s]tate motor vehicle department registration files" as well as their own "files of franchise dealer[s]" in order to "obtain the names and addresses of subsequent purchasers of cars." Moreover, because under the Senate bill the "recall" notice functioned merely to alert consumers that they could assert their warranty rights against the manufacturer, such notice served no purpose if the consumer owned a car that had exceeded its useful life. In such cases, the warranty repair obliga-

[7] As noted above, the Senate bill included no five-year limit on the "useful life" of cars and engines. The Committee, therefore, anticipated that some cars could be many years old and yet still be within their useful lives.

tion—the consumer's sole recourse under the bill—ended once the car travelled 50,000 miles. The Committee, apparently in acknowledgment of the practical difficulty of providing notice to owners of older cars, and in recognition of the pointlessness of requiring notice to owners of cars that had in all likelihood passed their useful lives, stated that "[t]he 50,000-mile period can be assumed to be 4 to 5 years and the manufacturer should be expected to notify any owner of a vehicle that is five years old or less . . . . " This sentence is, of course, irrelevant to the statute as enacted, because Congress later added both the five-year age limit to the definition of "useful life" and added a recall repair obligation independent of the warranty terms.

Indeed, the fundamental thing about the passage from the Senate Report is its total irrelevancy to the present Act. For the law as enacted, in contrast to the Senate bill,[8] imposes an *independent* recall repair obligation in addition to the warranty obligation. Section 7541 of Title 42 requires the manufacturer of a recalled class to submit and comply with a remedial plan for that class. Unlike the warranty repair obligation, the recall repair obligation extends to all member vehicles or engines in the recall class, and is not limited by the age of the vehicle or engine at the time of repair. Thus, the passage explains an earlier version of section 207 that limited the manufacturer's repair responsibilities to those arising out of a warranty covering cars within their useful lives at the time of repair. It is simply inapplicable to the final

[8] The House bill contained no "recall" provision whatsoever. *See* H. Rep. No. 1146, 91st Cong., 2d Sess. 11-13 (discussion of "Automotive emission control provisions"). The House bill included only a design warranty requirement, *see id.* at 40 (section 206(e) of H.R. 17255), and an EPA authorization to halt manufacture of new cars if it determined that the engines or vehicles being produced did not comply with the standards, *see id.* at 38 (section 206(b) of H.R. 17255).

version of the Act.[9] The majority's decisive reliance[10] on the passage from the Senate Report is therefore misplaced.

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[9] The majority suggests that the Congress' rewrite of the recall provision in conference was a meaningless gesture, signifying nothing. *See* Maj. Op. at 29-32 n.61. While the urge is strong to pass this one by ("Let the long contention cease! Geese are swans and swans are geese!" M. Arnold, *The Last Word*), I will respond briefly.

Attempting to transform the *absence of comment* on a conference committee amendment into a positive indication of legislative intent to make *no* change contravenes two established principles of statutory construction: (1) "an amendment indicates that [the legislature] thereby intended to change the original [bill] by creating a new right or withdrawing an existing one," 1A C. Sands, Statutes and Statutory Construction § 22.30, at 178 (4th ed. 1972), and (2) "[t]he presumption against interpreting a statute in a way which renders it ineffective is hornbook law," FTC v. Manager, Retail Credit Co., 515 F.2d 988, 994 (D.C. Cir. 1975). Moreover, the search for significance in legislative silence is at best a hazardous enterprise. *See, e.g.*, Scripps-Howard Radio v. FCC, 316 U.S. 4, 11 (1942). When Congress does not say anything other than in the statute itself, that is where we look for guidance. Thus, the majority cannot reasonably rely on congressional silence to invalidate an otherwise reasonable EPA rule, especially when, according to its own admission, it "render[s] useless" the statutory provision itself.

[10] The majority relies almost entirely on this one passage to support its central arguments as to congressional intent. *See* Maj. Op. at 28-36. It does cite a few additional passages as evidence that "Congress intentionally limited the duration of a manufacturer's liability for a vehicle's conformity to standards to a five-year/fifty thousand-mile period . . . ." *Id.* at 37 (emphasis omitted); *see also id.* at 37-38 n.76 (reiterating same point). These additional passages, however, demonstrate nothing more than a congressional purpose—clearly evidenced by the statutory language, *see* 42 U.S.C. § 7521(d)—to define and limit the "useful life" term as it legitimately applies throughout the statute. The question presented by this case, not solved by the definition of "useful life," is whether a member vehicle or engine of a recalled class that has exceeded its useful life should nevertheless be repaired by the manufacturer.

In sum, then, I find nothing in the language, history, or purpose of the Act that readily supports the majority's invalidation of the EPA's interpretative rule. I believe it is an eminently reasonable rule, geared to fit the words and the theme of the Clean Air Act Amendments.

THE PANEL AND THE CONCURRING OPINIONS ARE INCONSISTENT INTERNALLY AS WELL AS WITH EACH OTHER AND POSE MORE PRACTICAL DIFFICULTIES THAN THE RULE THAT THEY STRIKE DOWN

Finally, I do not believe the panel opinion can logically coexist with its own proposed "legislative" rule or with Judge Wilkey's concurring opinion. Toward the end of the majority opinion, Judge Bazelon suggests that a "legislative rulemaking with attendant notice and comment procedures" could redress the "difficulty" arising from the decision that a manufacturer may now avoid recall by protracted litigious strategems. Maj. Op. at 40. Yet throughout its opinion the majority reiterates its view that the drafters of section 207 intended that vehicles and engines beyond their useful lives at the *time of repair* need not be remedied by the manufacturers. *See, e.g.*, Maj. Op. at 20 ("vehicles beyond their useful lives have no nonconformity to be remedied");[11] *id.* at 22 ("the EPA invites manufacturers to indulge in fact-specific controversies concerning whether a given car, beyond its useful life when presented for repair, experienced nonconformity during its useful life . . . .");[12] *id.*

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[11] This semantic argument assumes away the plain language of section 207. *See supra* at 4-5. It is evident from the statutory language and legislative history, *see supra* at 4-9, that Congress intended to provide classwide remedies for classwide design or performance defects that showed up during the useful life of the cars listed as representative samples of the class. A defective class—its members—can therefore be deemed "nonconforming."

[12] As demonstrated *supra* at 4-5, the Congress authorized EPA to order recall of a vehicle once it determines that (1) a

at 25 ("a blanket rule disregarding the age of the car when presented for repair in effect requires the manu-

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class of cars exhibited nonconformity during their useful lives, and (2) the particular car belongs to that class. The first determination requires that the EPA test sample consist of cars that have not exceeded their useful lives. The EPA then may recall any car within the class represented by that sample.

The EPA's rule absolves manufacturers of the responsibility "to remedy the nonconformity of a vehicle which, although part of the recall class, experienced nonconformity only after expiration of the vehicle's useful life." 45 Fed. Reg. at 36,397 n.2. The majority finds fault with this so-called "concession," saying that it "erodes [EPA's] class-based theory" and "offers little relief to manufacturers in practice." Maj. Op. at 23.

I find this rule perfectly consistent with the statutory scheme. *Cf.* Maj. Op. at 22 n.50. Congress obviously intended EPA to conduct tests on representative samples and to recall cars on the basis of the results. Unless Congress wanted EPA to test every car in a class, Congress was willing to allow such a statistical inference. Contrary to the majority's unnecessarily rigid—even stolid—view of my reasoning, *see id.* (characterizing "the dissent's position that *all* vehicles which are part of a nonconforming class are subject to repair at manufacturer expense") (emphasis in original), I believe the EPA sensibly interpreted the statute's statistical inference to permit exceptions upon an adequate showing by the manufacturers. Thus EPA's rule simply permits the manufacturers to rebut this statistical inference.

The majority also criticizes the statistical inference by questioning the adequacy of EPA's sampling. *See* Maj. Op. at 23. This criticism, of course, does not undercut EPA's interpretative rule. Instead, it merely questions EPA's implementation of the rule in this case. I note that General Motors has not questioned the adequacy of the EPA testing in this case. Indeed, GM in its brief stated that subsequent to the EPA tests, "GM and EPA worked out a test program, to be done by GM with EPA's participation . . . . *GM concluded that a noncompliance existed* and suggested a repair method in February, 1977." GM Brief at 35-36 (emphasis added).

Finally, the majority decries EPA's rule because "such a showing [of compliance within the useful life] may be im-

facturer to make an older car meet standards that Congress intentionally required only younger cars to meet . . . . the EPA rule [therefore] exceeds the limits of permissible statutory interpretation").[13] It is therefore

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possible with respect to cars that have exceeded their useful lives when presented for repair." Maj. Op. at 24. Given the evident congressional intent to trigger recalls by the testing of classwide samples, I believe the burden of exemption from the recall repair obligation properly falls upon the manufacturers. In fact, I see no other practical way of implementing the majority's own proposed "legislative rule" or the rule suggested in Judge Wilkey's concurrence. Under either proposal, cars within their useful lives at the time of the EPA notice of noncompliance would be repaired at the manufacturer's expense even though they exceeded their useful lives by the time the recall actually occurred. *See* Maj. Op. at 40 n.79; Conc. Op. at 3-4. Either rule would have to presume that some cars, out of compliance and past their useful life at the time of repair, violated the emission standards during their useful life.

[13] EPA has explained that GM would be required to perform only the same repair on the "older cars" that GM must perform on the "younger cars." *See* Maj. Op. at 24. The majority condemns the EPA rule, so read, for mandating "manipulation[s]" that do not "remedy a nonconformity as the statutory language clearly contemplates," *id.* at 28 (emphasis omitted).

The majority, in hypothesizing about possible future problems in the implementation of EPA's rule, not presented by this case, exceeds the proper scope of an inquiry into "the validity of the rule." Maj. Op. at 25 n.58. The rule requires manufacturers simply to devise plans for the "remedy [of] all properly maintained and used vehicles which experienced the nonconformity during their useful lives . . . ." 45 Fed. Reg. at 36,398. Such a requirement is neither *per se* unreasonable nor invalid on its face. The "remedy" required by the rule for older cars may well not turn out to be as burdensome as the majority seems to believe. *See* Association of Nat'l Advertisers, Inc. v. FTC, 617 F.2d 611, 621 (D.C. Cir. 1979) ("it may be that this provision *will* unlawfully burden rights . . . but in this situation, when the precise operation and impact of the requirement are unsettled, it is best for the judiciary to stay its hand until the provision in fact *does* result

difficult to see how the same section could authorize the legislative rule suggested by the majority—to toll the

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in the consequences appellants predict") (emphasis in original), *cert. denied*, 447 U.S. 921 (1980).

Furthermore, the application of the rule in this case is unquestionably reasonable. The remedial plan before us involves a few turns of a screwdriver, and it is not for this court to conjure up more complex remedial situations. *See, e.g.*, National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 703 (D.C. Cir. 1971) (courts should avoid decisions "that cannot be meaningfully analyzed without the aid of concrete factual backgrounds"); National Wildlife Fed'n v. Goldschmidt, 677 F.2d 259, 263 (2d Cir. 1982) ("A decision by us at this stage would resolve a dispute about a hypothetical highway. Courts have no business adjudicating the legality of non-events."). The EPA in oral argument attested to its flexibility in devising reasonable remedial schemes to fit other, more problematic, design and performance violations. Whether the rule will be applied reasonably to such violations should be left to future cases. *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967) (courts should not interfere with administrative decisionmaking until "its effects [are] felt in a concrete way"); *National Automatic Laundry*, 443 F.2d at 703 (observing "the need for restricting [judicial] rulings to broad questions fairly presentable in a litigation, without reaching questions of particular application that warrant separate consideration at a later time, if and when they arise"). The EPA rule does not set out any particular repair schemes: accordingly, this court's review of "the validity of the rule" does not, in my view, legitimate its current foray into purely theoretical future implementation problems.

If the lack of a decision on this question created substantial hardship to private regulated parties, then judicial intervention might be proper. *See, e.g., Abbott Laboratories*, 387 U.S. at 149; Gulf Oil Corp. v. United States Dept. of Energy, 663 F.2d 296, 311-12 (D.C. Cir. 1981). But the recall system imposes no risk upon the auto manufacturers that their rights could be prejudiced prior to judicial review of some future recall. Thus, I do not believe the majority properly exercises its reviewing function when it today invalidates a rule on the basis of problems not squarely presented to this court, and without affording EPA the opportunity to find methods of

"useful life" of the car at the time of EPA notification of noncompliance—or the "mathematical" rule suggested by Judge Wilkey—to include in remedial plans all cars and engines within their useful lives at the time of the EPA notice. Either one would require the repair of vehicles beyond the age limits set by Congress, and so violate the basic tenets of the panel's rationale.

Judge Wilkey's concurrence is equally puzzling. He extends the manufacturer's repair obligations to encompass only those cars within their useful lives at the time the EPA issues a notice of nonconformity. To arrive at this conclusion, he parses section 207(c) "work[ing] backward," and finds that a remedial plan must provide for only "the vehicles or engines with respect to which such notification is given." Conc. Op. at 2. Judge Wilkey, however, stops his backward trek through the statute too soon. Under section 207(c), EPA must give notice with respect to a "class or category of vehicles or engines" found not to conform to emission standards during their useful lives. The statute thus mandates *classwide* notice

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addressing such problems in a real—not hypothetical—situation.

I also note that these same remedial problems would plague the majority's "legislative rule" and Judge Wilkey's proposed "mathematical" solution. Both approaches would likewise require the remedial scheme to include some cars that have passed their useful lives, and so are equally obliged to address what standards should be employed in the repair of such older cars. In fact, many of the same problems inhere in remedying a class of cars *all* the members of which are still within their useful lives. Should the car with 49,999 clocked miles be repaired in the same way or according to the same standard as the car with 100 miles? Again, this is a question for another day. Given Congress' purpose to ensure that manufacturers build cars to conform with emission standards over their entire useful lives, however, I find nothing outrageous in requiring manufacturers to repair at some point the very defects that caused a class of cars to fail to meet those standards during their useful lives.

without limitation, and requires the manufacturer to repair all cars and engines "with respect to which [such] notice is given." Judge Wilkey nonetheless declares as if by fiat "[t]here can be no 'nonconformity' by automobiles which, at the time of EPA determination and notice have passed their useful lives." *Id.* In the face of a statute that requires notices of nonconformity to be sent with respect to entire classes of cars—some members of which might already be beyond their useful lives at the time of notice—one may properly wonder: why not? By the same token, the statutory language does not compel Judge Wilkey's notion that "[n]otification of nonconformity can only be given to manufacturers with regard to cars which are obligated to conform to emission standards . . . ." Conc. Op. at 3. The statute may fairly be read to require classwide notice, regardless of whether some members of the class have exceeded their useful lives.

Moreover, Judge Wilkey's notion that there can be no emission standards for cars beyond their useful life, *id.*, is directly at odds with his proposal that every car "within its useful life on the date of the EPA notice" should be repaired at the manufacturer's expense, no matter what the car's age or mileage at the time of repair, *id.* Under Judge Wilkey's proposal, many cars exceeding their useful lives at the time the recall is implemented would nevertheless be repaired pursuant to a remedial plan. How and why, under his original notion, should a car to which "no [emission] standards," apply and for which "there can be no nonconformity with emission standards," *id.* be part of an EPA-mandated remedial plan?

Finally, the majority objects to the EPA rule on the ground there is no adequate method to determine whether an overage car was ever in violation of the standards *during* its useful life. *See* Maj. Op. at 23 ("If the car is not presented for repair until it has exceeded its useful life, how will the timing of the onset of excessive

emissions be established?"). Yet, the panel's legislative rule and the concurrence's "mathematical" rule would both result in the repair of cars and engines exceeding their useful lives without any attempt to establish whether emission standards violations occurred during their useful lives. Both rules suggest to me that Judges Bazelon and Wilkey felt compelled pragmatically to find some escape from the statutory straightjacket in which they had laced themselves.

Unfortunately, neither succeeds in providing a principled exception to their basic, and I believe misguided, notion that only individual vehicles within their useful lives at the time the recall is implemented or the notice is given can suffer from a "nonconformity" to be remedied by the manufacturer's plan. Yet, in the absence of such an exception, the majority admits that the recall system will be "rendered useless." [14] Maj. Op. at 39. Like the EPA, I do not submit to the notion that only individual vehicles within their useful lives at the time of recall (or notice) can be "nonconforming" so as to come within the scope of the remedial plan. Congres-

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[14] The majority cites other enforcement mechanisms created by the Clean Air Act, as if their existence excuses the gutting of section 207(c). *See* Maj. Op. at 39 n.78. However, the certification provisions of the Act, 42 U.S.C. § 7525(a), (b), do not create a remedy for consumers who have already purchased defective vehicles or engines; instead, under the provision the EPA may only revoke the classwide manufacturing certificate, thereby preventing further *future* sales from the defective class of items. In addition, the performance and design warranty provisions, *id.* § 7541(a), (b) do not employ EPA oversight and testing capabilities; instead, they rely on individual consumers to detect that their cars are exceeding emission standards. Thus, the recall provision occupies an important position in the enforcement scheme: it combines the EPA role of conducting investigations of classes of vehicles and engines (also present in the certification provisions) and the purpose of policing on-the-road vehicles and engines (also present in the warranty provisions).

sional enactments should be interpreted to avoid impediments to clear congressional purpose. Section 207 accordingly should be interpreted in a way that can sustain a workable recall system: *classes* and *categories* of cars that have exhibited substantial nonconformity during their useful lives should be subject to recall.

To sum up, I find nothing in the plain language, nor in the legislative history of the Clean Air Act Amendments to contradict the EPA's reasonable interpretative rule. The EPA rule presents a practical solution to the implementation of the clear congressional purpose of achieving effective automotive emission controls. The majority opinion, by its own admission, seriously detracts from this overarching purpose.[18] Accordingly, I believe the majority, in invalidating the EPA rule, has transgressed the appropriate standards that limit judicial interference with an agency's reasonable actions to effectuate an important national policy.

I respectfully but emphatically dissent.

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[18] In a final assault, the majority peremptorily declares this case to be "virtually moot." Maj. Op. at 42 n.81. The meaning and legal significance of "virtual mootness" is, of course, mysterious; for if this case were "truly moot," the entire majority opinion would be dictum. In any case, the majority teases the auto manufacturers with yet another legal doctrine with which to circumvent the clear purposes of the Clean Air Act. This final aside, *id.*, seems particularly inappropriate considering this court's own contribution to the long pendency of this case.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 80-1868

General Motors Corporation,
a Delaware Corporation
Petitioner

v.

William D. Ruckelshaus, Administrator
United States Environmental Protection
Agency,
Respondent

And Consolidated Case Nos. 80-2027 and 81-1029

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 22 1984
GEORGE A. FISHER
CLERK

ORDER

Respondent's suggestion for rehearing *en banc*, filed February 29, 1984, has been circulated to the full Court. A majority of the Judges in regular active service have voted in favor of the suggestion. Accordingly, it is

ORDERED by the Court *en banc* that Respondent's suggestion for rehearing *en banc* is granted and it is

FURTHER ORDERED by the Court *en banc* that the Judgment and Opinions filed December 16, 1983 be, and the same hereby are, vacated.

A future Order will govern further proceedings in this case.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Tamm and Wilkey would deny the suggestion for rehearing *en banc*.

Circuit Judge Bork did not participate in this Order.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 80-1868

General Motors Corporation,
a Delaware Corporation
Petitioner

v.

William D. Ruckelshaus, Administrator
United States Environmental Protection
Agency,
Respondent

AND CONSOLIDATED CASES

United States Court of Appeals
for the District of Columbia Circuit
FILED APR 3 1984
GEORGE A. FISHER
CLERK

ORDER

This Court, by order dated March 22, 1984, vacated the earlier judgment and opinion filed herein and granted respondent's suggestion for rehearing *en banc*. Upon consideration thereof, it is

ORDERED, by the Court, *en banc*, that this case shall be argued before the Court, sitting *en banc*, at 10:00 A.M. on April 25, 1984. The parties shall furnish an additional 25 copies of their briefs previously filed herein within nine days from the

date of this order. In addition, the parties shall file supplemental briefs focusing on the following:

(1) indications in the language and legislative history of section 207(c) of the Clean Air Act that support or run counter to the EPA rule, and

(2) the comparative benefits or deficits of the remedial schemes set forth in the EPA rule, and Judge Wilkey's and Judge Bazelon's panel opinions, in light of the statutory language and purpose.

These briefs shall be filed by the parties on or before April 12, 1984 and shall not exceed 20 pages in length. An original and 30 copies shall be tendered to the Court.

For the Court:

George A. Fisher
Clerk

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNITED STATES COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20001-2866

September 7, 1984

RE: Nos. 80-1868 et al. - General Motors Corporation, a Delaware corporation v. William D. Ruckelshaus, Administrator, U.S. Environmental Protection Agency

Dear Counsel:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

Denise C. Thomas
Opinions Clerk

Enclosures

DISTRIBUTION:

Theodore Souris
George F. Ball
Samuel I. Gutter
Angus Macbeth

APPENDIX E

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 85

[FRL 1502-4]

Motor Vehicle Recalls Under the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).
ACTION: Interpretive Rule

SUMMARY: This rule sets forth EPA's interpretation regarding one aspect of a motor vehicle or motor vehicle engine manufacturer's recall liability under section 207(c)(1) of the Clean Air Act (Act). EPA interprets this section as requiring manufacturers to submit a plan to remedy all vehicles within the class or category of vehicles subject to an ordered recall which experienced the nonconformity during their useful lives regardless of their age or mileage at the time of repair. The interpretation set out in this rule will provide guidance to vehicle and engine manufacturers to better enable them to submit acceptable remedial plans.

DATES: This rule is effective May 30, 1980.

FOR FURTHER INFORMATION CONTACT: Mike Randall, Manufacturers Operations Division (EN-340), Environmental Protection Agency, Washington, DC 20460 at (202) 472-9425.

PUBLIC DOCKET: Copies of materials relevant to this rulemaking proceeding are contained in Public Docket EN-80-10 at the Central Docket Section of the U.S. Environmental Protection Agency, Room 2903B, Waterside Mall, 401 "M" Street, SW, Washington, DC 20460 and are available for review between the hours of 8:00 a.m. and 4:00 p.m. Monday through Friday. As

provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

SUPPLEMENTARY INFORMATION: Section 207(c)(1) of the Act provides in pertinent part:

(1) If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 202, when in actual use throughout their useful life (as determined under section 202(d)), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer.

Section 202(d)(1) of the Act defines the useful life of a light duty vehicle or a light duty vehicle engine as a period of use of five years or fifty thousand miles, whichever occurs first.[1]

In the past, manufacturers have not conditioned a vehicle's eligibility for a recall repair, at the manufacturer's expense, on the basis of the vehicle's age or mileage. Recently, however, some manufacturers have indicated that they will not repair, at their expense, nonconforming vehicles or engines which are beyond the vehicles' useful lives at the time those vehicles or

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[1] With regard to all other types of motor vehicles and motor vehicle engines, section 202(d) provides the Administrator with discretion to determine the approporiate useful life.

engines are presented for recall repairs. These manufacturers have argued that the reference to useful life in section 207(c)(1) of the Act permits them to impose such a limitation in their remedial plans. As discussed more fully below, this interpretation is inconsistent with the language and purpose of the Act, and its implementation could have a serious negative impact on ambient air quality.

The recall program has two objectives: 1) To assure that manufacturers repair vehicles which are exceeding the emission standards if those vehicles have been properly maintained and used and the nonconformity occurs within the useful life of the vehicles, and 2) to encourage manufacturers to build durable emission-related components to assure that vehicles will not manifest excessive emissions during their useful lives. Both of these objectives are frustrated by an interpretation of useful life which limits manufacturers' liability only to vehicles which are within their useful life at the time of repair.

EPA is issuing an interpretive rule to clarify this aspect of a manufacturer's recall liability under the Act in order to provide guidance to all vehicle and engine manufacturers. This should help to prevent any delays with individual recalls resulting from misunderstandings regarding the manufacturer's recall liability.

In EPA's view, the term "useful life" in section 207(c)(1) refers to a limitation placed upon the Administrator, requiring him to base a recall order on a finding that vehicles do not conform to the regulations prescribed under section 202(a) of the Act within their useful lives, and does not refer to a time or mileage limitation beyond which recalled vehicles need not be repaired at the manufacturer's expense. In other

words, as used in section 207(c) the term limits the basis for a determination of nonconformity but does not limit the scope of the remedy.

This conclusion is apparent from the language of the Act. Section 207(c)(1) provides that if the Administrator determines that a substantial number of vehicles of a given class or category are nonconforming "when in actual use throughout their useful life," he must notify the manufacturer "of such nonconformity" and require submission of a "plan for remedying the nonconformity of the vehicles or engines." The plan submitted by the manufacturer must "provide that the nonconformity of *any such vehicle* * * * be remedied * * * " (emphasis added). The language "any such vehicle" refers to vehicles in the class or category that the Administrator initially determines are subject to recall, and there is no indication that Congress intended to create an exception for nonconforming vehicles that are part of that class or category but have passed beyond their useful lives at the time of repair. The language of section 207(c)(1) permits the manufacturer to limit the scope of the remedial plan only on the basis of improper use or maintenance of particular nonconforming vehicles within the subject class or category. In other words, once the recall requirement is triggered, the manufacturer must submit a plan to remedy all properly used and maintained nonconforming vehicles in the subject class regardless of their age or mileage at the time of repair.[2]

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[2] In EPA's view, the manufacturer is not responsible to remedy the nonconformity of a vehicle which, although part of the recall class, experienced the nonconformity only after expiration of the vehicle's useful life. Also, for those vehicles which are subject to repair at the manufacturer's expense, the manufacturer is only responsible to carry out the remedy contained in the approved plan and is not responsible to remedy any other nonconformities.

The legislative history of the Act offers little guidance in this regard but is consistent with EPA's interpretation. Although Congress specified a 5 year/ 50,000 mile useful life for cars, it did so primarily to limit the industry's warranty liability in view of manufacturers' assertions that they could not guarantee compliance with emission standards for a longer period. Congress recognized that the actual life of a car is approximately ten years, rather than five, and was by no means indifferent to the problem of emissions from cars that have passed beyond their statutory useful lives but remain on the road for a number of years. Indeed, it expressed the hope that with proper operation and maintenance, the emission control systems on such vehicles would continue to provide some measure of emission control beyond each vehicle's useful life and thus minimize the vehicle's impact on air quality.[3] In view of this Congressional concern, it makes no sense to conclude that Congress intended to excuse a manufacturer from recall liability, for vehicles that have failed to comply with applicable standards during the statutory useful life simply because a particular vehicle has passed beyond the statutory useful life when presented for repair. Indeed, requiring repair of such vehicles furthers the Congressional intention by improving the vehicles' emission performance to the level they would have attained had they conformed originally with the standards during their useful lives.

If the reading of section 207(c)(1) advocated by several manufacturers were followed, anomalous results would occur and the effectiveness of the recall provision could be seriously undermined. For instance, the administrative process for recalls, which begins with an

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[3] S.R. No. 91-1196, 91st Cong., 2d Sess. 30 (1970).

investigation of vehicles that may be subject to recall and ends with the manufacturer repairing the nonconforming vehicles, can consume a great deal of time.[4] During that time many nonconforming vehicles may exceed their useful lives. This problem is further complicated by the fact that many vehicles which cease to conform during their useful lives do not manifest any emission nonconformity until they have accumulated significant mileage. Thus, a useful life limitation on remedial repairs, such as that asserted by some manufacturers, could preclude the repair of many vehicles, particularly those which do not evidence a nonconformity until late in their useful lives. The problem could be even more acute where recall is challenged in an administrative hearing since, by the time a hearing is concluded and subsequent appeals are exhausted, all vehicles involved may have passed beyond the end of their useful lives.[5] Additionally, an adoption of this interpretation would

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[4] This administrative process includes a number of different steps. The vehicles subject to an investigation usually undergo surveillance and confirmatory testing. Based on analysis of the test results the Administrator may issue a recall order. Under 40 CFR 85.1802(a), the manufacturer has at least 45 days to respond to the recall order by submitting a remedial plan, or the manufacturer may choose to challenge the Administrator's determination in an administrative hearing. If a remedial plan is submitted, it may prove to be deficient, in which case there may be lengthy negotiations before an acceptable plan is approved. Once an acceptable remedial plan is submitted and approved, the manufacturer must give notice of the recall campaign to the owners of the vehicles involved. Finally the vehicle owner brings the vehicle to a dealership for the actual repair.

[5] Of particular note is EPA's recall of 1979 Chrysler vehicles with 360 and 400 cubic inch displacement (CID) engines on December 8, 1976. This recall order is now under consideration by the U.S. Court of Appeals for the District of Columbia Circuit. A decision is expected by mid-1980 at the earliest, when many, if not all, of these vehicles will be beyond their useful lives.

provide an incentive for greater delays in the administrative process in the future, thereby further limiting the number of vehicles which would receive the remedial repair.

For these reasons, interpreting section 207(c)(1) as imposing a useful life limitation on vehicles eligible for repair under a remedial plan could severely limit the number of nonconforming vehicles repaired pursuant to recall orders, could seriously impact ambient air quality, and would frustrate the intent of Congress. Accordingly, I conclude that Section 207(c)(1) should be interpreted to require remedial plans to provide for remedying of nonconforming vehicles as set forth in the interpretive rule that appears below.

NOTE: This rulemaking constitutes a "nationally applicable regulation" under section 307(b)(1) of the Clean Air Act, as amended. 42 U.S.C. 7607(b)(1). Any judicial review of this action is, accordingly, governed by that provision.

Pursuant to section 307(d)(1)(N) of the Clean Air Act, as amended, 42 U.S.C. 7607(d)(1)(N), and section 553(b)(A) of the Administrative Procedure Act, 5 U.S.C. 553(b)(A), this interpretive rule is being promulgated as a final rule effective upon publication.

Under EPA's *Final Report Implementing Executive Order 12044*, 44 Fed. Reg. 30988 (1979), EPA is required to judge whether a regulation is "significant" and therefore subject to the procedural requirements of the order or whether it may follow other specialized development procedures. EPA labels regulation of the latter type "specialized." I have reviewed this regulation and have determined that it is specialized and therefore not subject to the procedural requirements of Executive Order 12044.

Dated: May 22, 1980.

Barbara Blum,
Acting Administrator.

Accordingly, Part 85 of Title 40 of the Code of Federal Regulations is revised as follows:

1. By adding a note at the end of § 85.1803 as set forth below:

§ 85.1803 Remedial Plan.

* * * * *

Note. — An interpretive ruling regarding § 85.1803 is published in Appendix A to this subpart.

2. By adding Appendix A to subpart S as set forth below:

Appendix A — Interpretive Ruling for § 85.1803 — Remedial Plans

The purpose of this rule is to set forth EPA's interpretation regarding one aspect of a motor vehicle or motor vehicle engine manufacturer's recall liability under section 207(c)(1) of the Clean Air Act, 42 U.S.C. 7641(c)(1). This rule will provide guidance to vehicle and engine manufacturers to better enable them to submit acceptable remedial plans.

Section 207(c)(1) requires the Administrator to base a recall order on a determination that a substantial number of in-use vehicles or engines within a given class or category of vehicles or engines, although properly maintained and used, fail to conform to the regulations prescribed under section 202 when in actual use throughout their useful lives. After making such a determination, he shall require the manufacturer to submit a plan to remedy the nonconformity of any such

vehicles or engines. The plan shall provide that the manufacturer will remedy, at the manufacturer's expense, all properly maintained and used vehicles which experienced the nonconformity during their useful lives regardless of their age or mileage at the time of repair.

(Sections 207 and 301(a) of the Clean Air Act, as amended, 42 U.S.C. 7541 and 7601(a)).

APPENDIX F

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

June 23, 1980

OFFICE OF ENFORCEMENT

Mr. T. M. Fisher
Director
Automotive Emission Control
Environmental Activities Staff
General Motors Technical Center
Warren, Michigan 48090

Dear Mr. Fisher:

In our letter of December 26, 1979 we approved General Motors' (GM) remedial plan of February 15, 1978 for 1975 Cadillac vehicles of the 60V45 engine family with carburetor part number 7045230 (230 carburetor) conditioned on GM's acceptance of several modifications to that plan. On February 5, 1980 GM responded to that letter expressing its doubts as to the wisdom of implementing the recall given the expected number of vehicles which would be repaired under the recall. This was based on GM's assumption that vehicles which have exceeded their useful lives (5 years or 50,000 miles, whichever occurs first) are no longer subject to the recall order under section 207(c)(1) of the Clean Air Act (Act). GM suggested that the Administrator withdraw his recall order. GM estimates that of the 220,000 Cadillacs in the 60V45 engine family, only 52,000 vehicles are still eligible for repair, and of these, even fewer would actually receive the repair.

The Administator does not intend to withdraw the recall order for these 1975 Cadillacs. The order was based upon a finding that a substantial number of 1975 Cadillacs of engine family 60V45 with the 230 carburetor, although properly maintained and used, do not conform with the 1975 standard for

carbon monoxide (CO) when in actual use throughout their useful lives. Since we are confident, and GM has not disputed, that these Cadillacs do not conform to Federal emission standards, a retraction of the recall order for these vehicles would be inappropriate.

In your letter of February 5, 1980 you reiterated GM's position regarding the useful life requirement of the Act. You state that because of this limitation in the Act, 1975 Cadillacs which have exceeded their useful lives are no longer subject to the recall order.

You further indicate in your February 5, 1980 letter that if EPA intends to proceed with the recall, the first and second conditions specified on page 3 of our December 26, 1980 letter should be revised. The revised language which you have suggested is acceptable.

We will be pleased to discuss with you the audit issues raised in your February 5, 1980 letter prior to the initiation of the audit.

With our acceptance of the modifications to conditions 1 and 2 as requested by GM, we believe that all of the outstanding issues which pertain to the remedial plan have been resolved except for GM's refusal to bear the cost of repair under this remedial plan for vehicles which are more than 5 years old or are beyond 50,000 miles. Until this "useful life" issue is resolved, we intend to proceed with a recall of a portion of these 1975 Cadillacs by partially approving GM's remedial plan of February 15, 1978 so that some of the vehicles might be brought into conformity with emission standards. Therefore, EPA approves GM's remedial plan of February 15, 1978 in so far as it remedies, at GM's expense, those 1975 Cadillacs of engine family 60V45 with the 230 carburetor which will still be within their useful lives at the time of their repair (hereinafter, we will refer to this as the Plan). This approval is further conditioned upon GM's acceptance of the following:

1. Representations concerning the EPA audit made to all dealers or field personnel, such as in the Dealer Emission Bulletin, are acceptable.

2. Within 45 days after owner notification has begun, GM will provide to EPA a list of the names of owners and their addresses, vehicle identification numbers, names of dealers who performed the repair and the dates of the repair for all vehicles which have received the remedial repair.

3. GM will add to the Dealer Emission Bulletin contained in its February 15, 1980 remedial plan an inspection, and an adjustment, if necessary, of ignition timing prior to the idle mixture adjustment.

4. On the average fifty percent of the idle mixture screw caps, APT plugs, and customer satisfaction cards necessary to complete this recall campaign will be provided to dealers at the time owner notification begins. The remainder will be at GM part distribution centers.

Agreement to and acceptance by GM of all the modifications specified herein is a condition precedent to EPA approval of the Plan. Execution by an authorized GM representative of the agreement set forth at the end of this letter will constitute GM's agreement to the foregoing modifications to the Plan. For your convenience, we have enclosed an additional copy of the letter for your files and a preaddressed envelope for returning the original executed agreement.

GM indicated in its letter of February 5, 1980 its belief that section 207(c)(1) of the Act imposes no duty upon GM to remedy, at its expense, 1975 Cadillacs beyond their useful lives. As you know, we do not agree with GM's interpretation of its responsibilities under the Act and have recently issued an interpretive rule, 45 Fed. Reg. 36396 (1980), to articulate EPA's position regarding this aspect of a motor vehicle manufacturer's recall liability under the Act. As that rule reflects, we believe that the "useful life" language in the statute refers

not to a time or mileage limitation beyond which recalled vehicles need not be repaired, but instead requires the Administrator to base a recall order on vehicles which are in nonconformity within their useful lives. After making such a determination, he shall require the manufacturer to submit a plan to remedy the nonconformity of any such vehicles or engines. The plan shall provide that the manufacturer will remedy, at the manufacturer's expense, all properly maintained and used vehicles which experienced the nonconformity during their useful lives regardless of their age or mileage at the time of repair.

Therefore, EPA finds that GM has failed to submit a plan as required by section 207(c)(1) of the Act which remedies, at GM's expense, 1975 Cadillacs of engine family 60V45 with the 230 carburetor which failed or will fail to conform to applicable emission standards during their useful lives but will be beyond their useful lives at the time of repair. The failure to submit a plan for these vehicles is considered to be a separate offense under sections 203(a)(4)(B) and 205 of the Act for each vehicle and can potentially subject GM to fines of up to $10,000 per vehicle.

We encourage GM to reconsider its position regarding the remedying of those 1975 Cadillacs beyond their useful lives and to submit a plan which provides for their repair at GM's expense. If GM fails to submit such a plan within 20 days, we will consider instituting appropriate action to require GM to remedy those 1975 Cadillacs with the 230 carburetor beyond their useful lives.

We are, therefore, approving that portion of the remedial plan, subject to GM's acceptance of conditions 1 through 4, that remedies, at GM's expense, those vehicles with the 230 carburetor which will be within their useful lives at the time of their presentation to the dealer for repair. We disapprove that portion of the plan which pertains to vehicles with the 230 carburetor which will be beyond their useful lives at the time of repair. This approval, in part, will permit GM to initiate the

recall campaign and bring a portion of the vehicle class into conformity with the emission standards.

Reports and documents required under this Plan should be submitted to the Director, Manufacturers Operations Division (EN-340), 401 M Street, S.W., Washington D.C. 20460.

If you cannot accept the modifications herein, please contact Mr. William Heglund at (202) 472-9421 within 20 days of the date of this letter. If you accept the Plan as modified, you will proceed with owner notification within 20 days of the receipt of this letter in accordance with 40 C.F.R. §85.1804(a)(1). A revised dealer bulletin and owner notification letter for the Plan reflecting the conditions agreed to above will be submitted to EPA by the day on which owner notification first begins.

Sincerely yours,

/s/Charles N. Freed
Acting Deputy Assistant Administrator
for Mobile Source, Noise and Radiation
Enforcement (EN-337)

On behalf of General Motors Corporation, I am authorized to and do hereby agree to and accept each modification to the Plan specified herein.

_____

Signature

_____

Title

_____

Date

APPENDIX G

Section 202. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A)(i) The Administrator shall prescribe regulations under paragraph (1) of this subsection applicable to emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen from classes or categories of heavy-duty vehicles or engines manufactured during and after model year 1979. Such regulations applicable to such pollutants from such classes or categories of vehicles or engines manufactured during model years 1979 through 1982 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which standards apply, giving appropriate consideration to the cost of applying such technolo-

gy within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology.

(ii) Unless a different standard is temporarily promulgated as provided in subparagraph (B) or unless the standard is changed as provided in subparagraph (E), regulations under paragraph (1) of this subsection applicable to emissions from vehicles or engines manufactured during and after model year—

> (I) 1983, in the case of hydrocarbons and carbon monoxide, shall contain standards which require a reduction of at least 90 per cent, and
>
> (II) 1985, in the case of oxides of nitrogen, shall contain standards which require a reduction of at least 75 per cent,

from the average of the actually measured emissions from heavy-duty gasoline-fueled vehicles or engines, or any class or category thereof, manufactured during the baseline model year.

(iii) The Administrator shall prescribe regulations under paragraph (1) of this subsection applicable to emissions of particulate matter from classes or categories of vehicles manufactured during and after model year 1981 (or during any earlier model year, if practicable). Such regulations shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology. Such standards shall be promulgated and shall take effect as expeditiously as practicable taking into account the period necessary for compliance.

(iv) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, or such other factors as may be appropriate.

(v) For the purpose of this paragraph, the term "baseline model year" means, with respect to any pollutant emitted from any vehicle or engine, or class or category thereof, the model year immediately preceding the model year in which Federal standards applicable to such vehicle or engine, or class or category thereof, first applied with respect to such pollutant.

(B) During the period of June 1 through December 31, 1978, in the case of hydrocarbons and carbon monoxide, or during the period of June 1 through December 31, 1980, in the case of oxides of nitrogen, and during each period of June 1 through December 31 of each third year thereafter, the Administrator may, after notice and opportunity for a public hearing promulgate regulations revising any standard prescribed as provided in subparagraph (A)(ii) for any class or category of heavy-duty vehicles or engines. Such standard shall apply only for the period of three model years beginning four model years after the model year in which such revised standard is promulgated. In revising any standard under this subparagraph for any such three model year period, the Administrator shall determine the maximum degree of emission reduction which can be achieved by means reasonably expected to be available for production of such period and shall prescribe a revised emission standard in accordance with such determination. Such revised standard shall require a reduction of emissions from any standard which applies in the previous model year.

(C) Action revising any standard for any period may be taken by the Administrator under subparagraph (B) only if he finds—

(i) that compliance with the emission standards otherwise applicable for such model year cannot be achieved by

technology, processes, operating methods, or other alternatives reasonably expected to be available for production for such model year without increasing cost or decreasing fuel economy to an excessive and unreasonable degree; and

(ii) the National Academy of Sciences has not, pursuant to its study and investigation under subsection (c) of this section, issued a report substantially contrary to the findings of the Administrator under clause (i).

(D) A report shall be made to the Congress with respect to any standard revised under subparagraph (B) which shall contain—

(i) a summary of the health effects found, or believed to be associated with, the pollutant covered by such standard,

(ii) an analysis of the cost-effectiveness of other strategies for attaining and maintaining national ambient air quality standards and carrying out regulations under part C of subchapter I of this chapter (relating to significant deterioration) in relation to the cost-effectiveness for such purposes of standards which, but for such revision, would apply.

(iii) a summary of the research and development efforts and progress being made by each manufacturer for purposes of meeting the standards promulgated as provided in subparagraph (A)(ii) or, if applicable, subparagraph (E), and

(iv) specific findings as to the relative costs of compliance, and relative fuel economy, which may be expected to result from the application for any model year of such revised standard and the application for such model year of the standard, which, but for such revision, would apply.

(E)(i) The Administrator shall conduct a continuing pollutant-specific study concerning the effects of each air pollutant emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare. The results of such study shall be published in the

Federal Register and reported to the Congress not later than June 1, 1978, in the case of hydrocarbons and carbon monoxide, and June 1, 1980, in the case of oxides of nitrogen, and before June 1 of each third year thereafter.

(ii) On the basis of such study and such other information as is available to him (including the studies under section 7548 of this title), the Administrator may, after notice and opportunity for a public hearing, promulgate regulations under paragraph (1) of this subsection changing any standard prescribed in subparagraph (A)(ii) (or revised under subparagraph (B) or previously changed under this subparagraph). No such changed standard shall apply for any model year before the model year four years after the model year during which regulations containing such changed standard are promulgated.

(F) For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1) of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with standards prescribed under this subsection if such device, system, or element of design will cause or contribute to an

unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to standards prescribed under this subsection without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

(5)(A) If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

(B) Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the

model year for which it would be feasible to implement such standards, taking into consideration the constraints of an adequate leadtime for design and production.

(C) Nothing in subparagraph (A) shall (i) prevent the Administrator from specifying different nozzle and fill neck sizes for gasoline with additives and gasoline without additives or (ii) permit the Administrator to require a specific location, configuration, modeling, or styling of the motor vehicle body with respect to the fuel tank fill neck or fill nozzle clearance envelope.

(D) For the purpose of this paragraph, the term "fill pipe" shall include the fuel tank fill pipe, fill neck, fill inlet, and closure.

(6) The Administrator shall determine the feasibility and desirability of requiring new motor vehicles to utilize onboard hydrocarbon control technology which would avoid the necessity of gasoline vapor recovery of uncontrolled emissions emanating from the fueling of motor vehicles. The Administrator shall compare the costs and effectiveness of such technology to that of implementing and maintaining vapor recovery systems (taking into consideration such factors as fuel economy, economic costs of such technology, administrative burdens, and equitable distribution of costs). If the Administrator finds that it is feasible and desirable to employ such technology, he shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, standards requiring the use of onboard hydrocarbon technology which shall not become effective until the introduction to the model year for which it would be feasible to implement such standards, taking into consideration compliance costs and the restraints of an adequate lead time for design and production.

* * * * *

(d) Useful life of vehicles

The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 7541 of this title. Such regulations shall provide that useful life shall—

(1) in the case of light duty vehicles and light duty vehicle engines, be a period of use of five years or of fifty thousand miles (or the equivalent), whichever first occurs;

(2) in the case of any other motor vehicle or motor vehicle engine (other than motorcycles or motorcycle engines), be a period of use set forth in paragraph (1) unless the Administrator determines that a period of use of greater duration or mileage is appropriate; and

(3) in the case of any motorcycle or motorcycle engine, be a period of use the Administrator shall determine.

Section 207. Compliance by vehicles and engines in actual use

(a) Warranty; certification; payment of replacement costs of parts, devices, or components designed for emission control

(1) Effective with respect to vehicles and engines manufactured in model years beginning more than 60 days after December 31, 1970, the manufacturer of each new motor vehicle and new motor vehicle engine shall warrant to the ultimate purchaser and each subsequent purchaser that such vehicle or engine is (A) designed, built, and equipped so as to conform at the time of sale with applicable regulations under section 7521 of this title, and (B) free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life (as determined under section 7521(d) of this title).

(2) In the case of a motor vehicle part or motor vehicle engine part, the manufacturer or rebuilder of such part may certify

that use of such part will not result in a failure of the vehicle or engine to comply with emission standards promulgated under section 7521 of this title. Such certification shall be made only under such regulations as may be promulgated by the Administrator to carry out the purposes of subsection (b) of this section. The Administrator shall promulgate such regulations no later than two years following August 7, 1977.

(3) The cost of any part, device, or component of any light-duty vehicle that is designed for emission control and which in the instructions issued pursuant to subsection (c)(3) of this section is scheduled for replacement during the useful life of the vehicle in order to maintain compliance with regulations under section 7521 of this title, the failure of which shall not interfere with the normal performance of the vehicle, and the expected retail price of which, including installation costs, is greater than 2 percent of the suggested retail price of such vehicle, shall be borne or reimbursed at the time of replacement by the vehicle manufacturer and such replacement shall be provided without cost to the ultimate purchaser, subsequent purchaser, or dealer. The term "designed for emission control" as used in the preceding sentence means a catalytic converter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions (not including those vehicle components which were in general use prior to model year 1968 and the primary function of which is not related to emission control).

(b) Testing methods and procedures

If the Administrator determines that (i) there are available testing methods and procedures to ascertain whether, when in actual use throughout its useful life (as determined under section 7521(d) of this title), each vehicle and engine to which regulations under section 7521 of this title apply complies with the emission standards of such regulations, (ii) such methods and procedures are in accordance with good engineering practices, and (iii) such methods and procedures are reasonably

capable of being correlated with tests conducted under section 7525(a)(1) of this title, then—

(1) he shall establish such methods and procedures by regulation, and

(2) at such time as he determines that inspection facilities or equipment are available for purposes of carrying out testing methods and procedures established under paragraph (1), he shall prescribe regulations which shall require manufacturers to warrant the emission control device or system of each new motor vehicle or new motor vehicle engine to which a regulation under section 7521 of this title applies and which is manufactured in a model year beginning after the Administrator first prescribes warranty regulations under this paragraph (2). The warranty under such regulations shall run to the ultimate purchaser and each subsequent purchaser and shall provide that if—

(A) the vehicle or engine is maintained and operated in accordance with instructions under subsection (c)(3) of this section,

(B) it fails to conform at any time during its useful life (as determined under section 7521(d) of this title) to the regulations prescribed under section 7521 of this title, and

(C) such nonconformity results in the ultimate purchaser (or any subsequent purchaser) of such vehicle or engine having to bear any penalty or other sanction (including the denial of the right to use such vehicle or engine) under State or Federal Law,

then such manufacturer shall remedy such nonconformity under such warranty with the cost thereof to be borne by the manufacturer. No such warranty shall be invalid on the basis of any part used in the maintenance or repair of a vehicle or engine if such part was certified as provided under subsection (a)(2) of this section.

For purposes of the warranty under this subsection, for the period after twenty-four months or twenty-four thousand miles (whichever first occurs) the term "emission control device or

system" means a catalytic converter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions. Such term shall not include those vehicle components which were in general use prior to model year 1968.

(c) Nonconforming vehicles; plan for remedying nonconformity; instructions for maintenance and use; label or tag

Effective with respect to vehicles and engines manufactured during model years beginning more than 60 days after December 31, 1970—

(1) If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title, when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. If the manufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing the Administrator withdraws such determination of nonconformity, he shall, within 60 days after the completion of such hearing, order the manufacturer to provide prompt notification of such nonconformity in accordance with paragraph (2).

(2) Any notification required by paragraph (1) with respect to any class or category of vehicles or engines shall be given to dealers, ultimate purchasers, and subsequent purchasers (if known) in such manner and containing such

information as the Administrator may by regulations require.

(3)(A) The manufacturer shall furnish with each new motor vehicle or motor vehicle engine written instructions for the proper maintenance and use of the vehicle or engine by the ultimate purchaser and such instructions shall correspond to regulations which the Administrator shall promulgate. The manufacturer shall provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and systems may be performed by any automotive repair establishment or individual using any automotive part which has been certified as provided in subsection (a)(2) of this section.

(B) The instruction under subparagraph (A) of this paragraph shall not include any condition on the ultimate purchaser's using, in connection with such vehicle or engine, any component or service (other than a component or service provided without charge under the terms of the purchase agreement) which is identified by brand, trade, or corporate name; or directly or indirectly distinguishing between service performed by the franchised dealers of such manufacturer or any other service establishments with which such manufacturer has a commercial relationship, and service performed by independent automotive repair facilities with which such manufacturer has no commercial relationship; except that the prohibition of this subsection may be waived by the Administrator if—

(i) the manufacturer satisfies the Administrator that the vehicle or engine will function properly only if the component or service so identified is used in connection with such vehicle or engine, and

(ii) the Administrator finds that such a waiver is in the public interest.

(C) In addition, the manufacturer shall indicate by means of a label or tag permanently affixed to such vehicle or engine that such vehicle or engine is covered by a certificate of conformity issued for the purpose of assuring achievement of emissions standards prescribed under section 7521 of this title. Such label or tag shall contain such other information relating to control of motor vehicle

emissions as the Administrator shall prescribe by regulation.

(d) Dealer costs borne by manufacturer

Any cost obligation of any dealer incurred as a result of any requirement imposed by subsection (a), (b), or (c) of this section shall be borne by the manufacturer. The transfer of any such cost obligation from a manufacturer to any dealer through franchise or other agreement is prohibited.

(e) Cost statement

If a manufacturer includes in any advertisement a statement respecting the cost or value of emission control devices or systems, such manufacturer shall set forth in such statement the cost or value attributed to such devices or systems by the Secretary of Labor (through the Bureau of Labor Statistics). The Secretary of Labor, and his representatives, shall have the same access for this purpose to the books, documents, papers, and records of a manufacturer as the Comptroller General has to those of a recipient of assistance for purposes of section 7611 of this title.

(f) Inspection after sale to ultimate purchaser

Any inspection of a motor vehicle or a motor vehicle engine for purposes of subsection (c)(1) of this section, after its sale to the ultimate purchaser, shall be made only if the owner of such vehicle or enging voluntarily permits such inspection to be made, except as may be provided by any State or local inspection program.

(g) Replacement and maintenance costs borne by owner

For the purposes of this section, the owner of any motor vehicle or motor vehicle engine warranted under this section is responsible in the proper maintenance of such vehicle or engine to replace and to maintain, at his expense at any service establishment or facility of his choosing, such items as spark plugs, points, condensers, and any other part, item, or device related

to emission control (but not designed for emission control under the terms of the last three sentences of subsection (a)(1)[2] of this section), unless such part, item, or device is covered by any warranty not mandated by this chapter.

(h) Dealer certification

(1) Upon the sale of each new light-duty motor vehicle by a dealer, the dealer shall furnish to the purchaser a certificate that such motor vehicle conforms to the applicable regulations under section 7521 of this title, including notice of the purchaser's rights under paragraph (2).

(2) If at any time during the period for which the warranty applies under subsection (b) of this section, a motor vehicle fails to conform to the applicable regulations under section 7521 of this title as determined under subsection (b) of this section such nonconformity shall be remedied by the manufacturer at the cost of the manufacturer pursuant to such warranty as provided in subsection (b)(2) of this section (without regard to subparagraph (C) thereof).

(3) Nothing in section 7543(a) of this title shall be construed to prohibit a State from testing, or requiring testing of, a motor vehicle after the date of sale of such vehicle to the ultimate purchaser (except that no new motor vehicle manufacturer or dealer may be required to conduct testing under this paragraph).

Section 301. Administration

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his

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[2]So in original. Probably should be "(a)(3)".

powers and duties under this chapter, except the making of regulations, as he may deem necessary or expedient.

(2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed—

(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter;

(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this chapter in implementing and enforcing the chapter, particularly in the review of new sources and in enforcement of the chapter; and

(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the chapter.

(b) Detail of Environmental Protection Agency personnel to air pollution control agencies

Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

(c) Payments under grants; Installments; advances or reimbursements

Payments under grants made under this chapter may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administrator.

Section 307. Administrative Proceedings and Judicial Review

* * * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such

action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to[3] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

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[3]So in original. The word "to" probably should not appear.

(C) the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,

(D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(E) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(F) promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders),

(G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(H) promulgation or revision of regulations under part B of subchapter I of this chapter (relating to stratosphere and ozone protection),

(I) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(J) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(K) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(L) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(M) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement), and

(N) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsec-

tion, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553 (b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule

relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) or paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator

shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has

been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in the section.

* * * * *

Calendar No. 1214

91st CONGRESS *2d Session* SENATE REPORT No. 91-1196

NATIONAL AIR QUALITY STANDARDS ACT OF 1970

REPORT
OF THE
COMMITTEE ON PUBLIC WORKS
UNITED STATES SENATE
TOGETHER WITH
INDIVIDUAL VIEWS
TO ACCOMPANY
S. 4358

SEPTEMBER 17, 1970.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1970

SECTION 207. VEHICLE AND VEHICLE ENGINE COMPLIANCE TESTING

Section 207 would represent a significant departure from prior provisions for control of vehicle emissions. At the present time compliance with national emission standards for vehicles and engines is determined on the basis of whether the average of a class or model complies with the standard. Section 206 continues this procedure. Under section 206 prototype models would be certified as to compliance with standards and production-line sample-testing would be authorized to assure that the average of the models coming off the production line conforms to preproduction certification.

Under section 207, each production line vehicle would be required to comply with applicable emission standards. Each vehicle would be required to comply with standards for a 50,000-mile lifetime. The manufacturer would be required to warranty the performance of each individual vehicle as to compliance with emission standards. The dealer would not carry any obligation under this provision.

This section would provide two methods to determine whether or not individual cars will perform to the emission standard. First, the Secretary would be provided with the authority to test representative samples of vehicles on the road and, if he found that a representative sample of a model or class fails to continue to comply with the standards within the 50,000-mile period, he could require the manufacturer to recall that model or class for the purpose of correcting any nonconformity.

The second compliance testing method would be triggered by the development of a quick test procedure. The Secretary would be required to develop a test which could be quickly and uniformly applied to individual vehicles on the production line and on the road to determine whether or not those vehicles comply or continue to comply with the standards for which they were certified. The quick test would have to be correlated with the precertification test procedure. It would have to be a test which could be applied in a reasonable period of time related to the normal time for a regular vehicle inspection. A quick test should avoid unnecessary slowdown of production lines, unnecessary consumer inconvenience, while providing a method to determine whether individual vehicles on the road are continuing to meet the standards for which they were certified.

The need to assure individual vehicle compliance became evident after sample-testing of vehicles on the road (both from California and nationally) revealed deterioration from conformance with the standard.

According to testimony of the National Air Pollution Control Administration:

> The more complete data confirm that slightly more than one-half of the cars tested failed to meet either the hydrocarbon or the carbon monoxide standard. For one model, more than 80 percent of the cars tested failed one or more tests. Due to the small number of cars, these emission data were not extrapolated to 50,000 miles; however, on the basis of the California data one would expect that the emissions would tend to increase to some extent with increased mileage accumulations.

This bill would require the American people to make a substantially greater investment in motor vehicles to assure that air quality standards are implemented. This investment would be defensible only if the emission control systems continued to conform to standards for the lifetime of the vehicle. Substantial deterioration from the emission standard would mean that the manufacturer was not designing emission control systems which meet the intent of this legislation. It would mean that air quality standards in regions throughout the Nation would not be effectively maintained, and it would mean that potentially billions of dollars of consumer investment would be to no purpose.

The Committee has no reason to believe that emission controls would be inexpensive. The automobile industry has indicated that achievement of the 1975 standards set

by the bill would be costly — whether such standards were achieved through cleaning up the internal combustion engine or through development of an alternative power source.

The manufacturers informed the Committee that they would not be able to guarantee conformity with emission standards for the anticipated 10-year life of a vehicle. The committee bill provides that 50,000 miles would be the maximum that a vehicle would be required to conform to the standards for which it was certified. The Committee bill would provide that a manufacturer may require reasonable evidence of proper maintenance of a vehicle and must provide written instructions on maintenance, adjustments, service and operation. The Committee hopes that, if the motorist complied with these instructions, emission controls would not deteriorate after 50,000 miles to the extent that ambient air quality would be impaired. The Committee further expects the manufacturer to endeavor to either improve the quality control of emission systems or explore better ways to assure continued compliance beyond 50,000 miles of use.

The warranty required by this section would not become effective until 90 days after enactment of this Act. This delay would be needed so that the manufacturer could prepare instructions for the motor vehicle purchaser. The Committee expects these instructions to be reasonable and uncomplicated. They would have to be approved by the Secretary. During such time as the warranty provision is effective, vehicles manufactured after that date would be required to comply with present standards. Vehicles manufactured in future years would have to be warranted to comply with such standards as may be applicable.

The Committee intends that the public should be made aware of the actual cost, not the manufacturer's price of any air pollution control equipment and warranty. While the Committee recognizes that separation of specific costs for air pollution control may be difficult, it is quite likely there would be a marked increase in cars in 1975. To the extent that such costs are attributed to the control of air pollution emissions the Committee intends that those increases be the actual cost of the air pollution systems involved.

The Committee also recognizes the difficulty in any recall provision of notifying the owners of vehicles. The burden would be placed on the manufacturer to notify both the initial and subsequent purchasers of vehicles. The Committee expects that the manufacturer would not only depend on the files of the franchise dealer, but would, to the extent practicable, use State motor vehicle department registration files to obtain the names and addresses of subsequent purchasers of cars. By establishing a 50,000 mile, no year lifetime for the purpose of warranty, the Committee did not intend to relieve the automobile manufacturers of their responsibility to notify owners of older cars. The 50,000-mile period can be assumed to be 4 to 5 years and the manufacturer should be expected to notify any owner of a vehicle that is five years old or less as to failure to continue to perform to the standard. A decision not to require the manufacturer to repair the vehicle could be made after notice and after finding that the vehicle had exceeded the 50,000-mile warranty period.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

VEHICLE AND VEHICLE ENGINE COMPLIANCE TESTING

Sec. 207. (a) Every manufacturer of a new vehicle or new vehicle engine, or both, subject to the regulations issued under section 202 of this title, shall, prior to the delivery thereof to the dealer, or if appropriate, the ultimate purchaser, test or cause to be tested such vehicles or engines in accordance with good engineering practices and such regulations as the Secretary may prescribe under this section, to ascertain that such vehicles or engines will conform to the applicable certificate issued under this title for the lifetime emmissions of such vehicle or engine. No certificate shall be issued for such vehicles or engines under this title unless the manufacturer has such a testing program.

(b) The Secretary shall establish methods and procedures for making tests under this section and inform the manufacturers with respect thereto by regulation promulgated in accordance with section 553 of title 5 of the United States Code. Such regulations adopted by the Secretary prior to enactment of the National Air Quality Standards Act of 1970 shall continue in force until modified by him consistent with the purposes of this section.

(c) Every new vehicle or new vehicle engine introduced in commerce for sale or resale shall be warranted by the manufacturer to be designed, built, and equipped so as to conform with applicable regulations issued under this title, and shall further be warranted to remain in conformity with such regulations for the lifetime of such vehicles or engines if properly maintained, serviced, and operated. Operation for fifty thousand miles shall be taken as the basis for the lifetime of a vehicle engine under this section.

As a condition to the obligation of manufacturers to correct deficient performance, manufacturers may require the ultimate purchaser and subsequent purchasers of such vehicles or engines (a) to provide reasonable evidence of the time when such vehicles or engines were first placed in regular service and (b) to provide reasonable evidence that prescribed maintenance, adjustment, and service requirements and schedules have been observed. The manufacturer shall furnish with each vehicle or engine written instructions for the proper maintenance, adjustment, operation, and service by the owner or operator. Such warranty shall apply to the vehicle on behalf of the ultimate purchaser and subsequent purchasers thereof. In addition, the manufacturer shall include on a label or tag permanently affixed to such vehicle or engine such information relating to control of vehicle emissions and compliance with this Act as the Secretary shall prescribe by regulation. The actual cost to the manufacturer of such systems or devices and installation thereof and warranty shall be disclosed in accordance with the provision of the Act of July 7, 1958 (15 U.S.C. 1231-1233).

(d)(1) The Secretary shall conduct, or cause to be conducted, such inspections, tests, studies, research, and investigations as may be necessary to determine whether any class of vehicles or engines continue to conform to the

regulations prescribed under section 202 of this Act after such vehicles or engines have been in operation for such period or number of miles as the Secretary may deem appropriate. Any such inspection of a vehicle or engine, after its sale to the ultimate purchaser, shall be made only if the owner of such vehicle or engine voluntarily permits such inspection to be made, except as may be provided by any State or local inspection program.

(2) If through testing, inspection, studies, or other investigation of statistically representative samples of any class or category of vehicles or vehicle engines, or by other means, the Secretary determines that such class or category of vehicles or engines, operated under proper maintenance and use, do not conform to the regulations prescribed under section 202 of this Act, or the certification issued under this title, he shall immediately notify the manufacturer thereof of such determination of nonconformity. The Secretary shall publish such notice and, with reasonable specificity, information concerning his determination of nonconformity in the Federal Register as promptly as possible. The Secretary shall within thirty days after such notice is issued afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing or in writing, with regard to such determination of nonconformity. The Secretary shall, within a reasonable time, but in no event more than sixty days from the date of notice of noncomformity, order the manufacturer to provide prompt notification of such nonconformity to the ultimate purchaser and, if known, subsequent purchasers of all such vehicles or vehicle engines included within the class or category unless the Secretary, on the basis of all the facts and evidence in the public record of such proceedings, shall conclude that the class or category of vehicles or engines is in conformity with the regulation and certification and publish

such conclusion together with the reasons therefor in the Federal Register as promptly as possible.

(e)(1) Every manufacturer of vehicles or engines subject to the provisions of this section shall furnish notification of any defect in such vehicle or engine produced by him, which he discovers during the term of any warranty required by this title, and which he determines, in good faith, causes or will cause such vehicle or engine to be in nonconformity with such certification or regulations, to the ultimate purchaser or subsequent purchaser thereof (where known to the manufacturer) within a reasonable time not to exceed sixty days after discovery of such defect.

(2) The notification required by this section shall be –

> *(A) by any expeditious process, which, for those purchasers who do not initially respond must include notice by certified mail to the last-known address of the ultimate purchaser of such vehicle or engine, and to any subsequent purchasers, if known, to whom has been tansferred [sic] any warranty required by this title;*
>
> *(B) by certified mail to the dealer of such vehicle or engine; and*
>
> *(C) by such other expeditious and reasonable means of informing purchasers thereof not known to the manufacturer.*

(3) The notification to such purchasers provided for in this subsection shall contain a clear description of the nonconformity, a statement of measures to be taken to remedy such nonconformity, and a commitment of the manufacturer to cause such nonconformity to be remedied at no cost to the owner.

(4) The manufacturer shall furnish, at the Secretary's request, copies of such notification to him.

(f) The United States district court shall have jurisdiction to restrain violations of this section or any order of the Secretary issued under this section.

APPENDIX H

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

May 9, 1980

OFFICE OF ENFORCEMENT

SUBJECT: Factual Background Supporting Need for Interpretive Rule on Motor Vehicle Manufacturers' Liability for Repair of Recall Vehicles.

TO: Jeffrey G. Miller
Acting Assistant Administrator for Enforcement
(EN-329)

THRU: Richard Kozlowski, Acting Deputy
Assistant Administrator for Mobile Source, Noise and Radiation Enforcement (EN-33-)

FROM: Charles N. Freed
Director, Manufacturers Operations Division
(EN-340)

BACKGROUND

As you know, we are about to promulgate an interpretive rule which outlines the Environmental Protection Agency's (EPA) views on one aspect of a motor vehicle manufacturer's liability to repair, at its expense, vehicles subject to a recall order of the Administrator under section 207(c)(1) of the Clean Air Act (Act). Certain auto manufacturers believe that a manufacturer is not obligated to repair recalled vehicles, at its expense, which are beyond their statutory useful lives (for light-duty vehicles this is defined under section 202(d) of the Act to be 5 years or 50,000 miles, whichever occurs first) at the time of

their repair.[1] We believe that while the Act requires that the nonconformity must occur within a vehicle's useful life, a manufacturer may not limit the remedy only to vehicles which are within their useful lives at the time the owners seek repair.

As will be indicated in the preamble to the interpretive rule, we believe that the purposes of the Act will be fulfilled only if the Agency's interpretation is followed. For your information and as a factual background for the interpretive rule, the discussion below will outline why, in our opinion, the auto industry's contrary interpretation would lead to results inconsistent with the intent and purpose of the Act.

DISCUSSION

Title II of the Act seeks to protect and enhance the quality of ambient air by controlling emissions from motor vehicles. Title II attempts to accomplish this objective by setting or permitting the Administrator to set emission standards for vehicles and engines and enforce these standards through the following major enforcement provisions: certification, assembly line testing, emission (production) warranty, and recall. The purpose of these provisions is to encourage motor vehicle manufacturers to design motor vehicles which would meet standards in-use for *at least* 5 years or 50,000 miles. *Legislative History, 1970*, p. 338; see sections 206 and 207 of the Act. During the certification process, prototype vehicles, built in anticipation of production, are tested by a manufacturer in order to demonstrate the production vehicles will be designed to be capable of complying with applicable emission standards. During a Selective Enforcement Audit (assembly line testing), new motor

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[1] Congress recognized that the actual life of a vehicle was 10 years. *A Legislative History of the Clean Air Act Amendments of 1970*, 93rd Cong., 2nd Sess. (Comm. Print 1974), Vol. 1, p. 430. In fact, according to *Market Data Book*, published annually by *Automotive News*, only 4% of all vehicles manufactured fail to last 5 years. 45% last longer than 10 years (see Attachment 1).

vehicles are tested as they leave the production line to determine if they are in compliance with the emission standards. Certification and assembly line testing provide assurance that, at least initially, motor vehicles will comply with Federal emission standards. The emission (production) warranty makes the manufacturer responsible for defects in materials or workmanship which cause a vehicle to exceed emission standards during its useful life. Its effectiveness is limited by the need for individual owners to discover a defective emission-related component. Hence, the recall program is the only Clean Air Act program which can effectively address the problem of widespread in-use emission nonconformities, resulting from defective components, poor design or deterioration of emission control systems in motor vehicles.[2]

It should be noted that the recall provision of the Act serves a dual purpose. First, it requires manufacturers to repair large numbers of vehicles which are polluting the air. Second, manufacturers, faced with the prospect of expensive recalls should their vehicles fail to meet Federal emission standards, are encouraged to design vehicles which will meet emission standards throughout their useful lives. Thus, any attempt to weaken the recall provision of the Act could remove the economic incentive for manufacturers to design vehicles that comply for their useful lives and, hence, significantly impact air quality.

A construction of section 207(c)(1) as proposed by the auto industry would almost certainly lead to results which would violate the spirit and purpose of the Act. The imposition of a useful life limitation by a manufacturer in its remedial plan that provides repair at the manufacturer's expense only for vehicles

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[2] Certain urban areas are scheduled to have inspection/maintenance programs by the end of 1982. These programs will require a vehicle to pass a tailpipe emissions test. This program will only catch gross hydrocarbon (HC) and carbon monoxide (CO) nonconformities and will not test for oxides of nitrogen (NOx) emissions.

within their useful lives at the time of repair could severly limit the number of older vehicles that will be repaired pursuant to a recall order.[3] Often it is not possible to recall these vehicles earlier, as many vehicles do not manifest an emissions nonconformity until they have accumulated sufficient mileage. This is even more significant when the emissions nonconformity either manifests itself or is identified by EPA near the end of a vehicle's useful life.[4] In such a situation by the time a class of vehicles is investigated,[5] a recall order issued, and a remedial

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[3] As Congress recognized in another context, owners of recalled vehicles tend not to have them remedied if the manufacturer does not absorb the cost: ". . . Now that the nation has finally developed the capability of discovering defects in motor vehicles, we must do all in our power to insure that those defects are remedied; all of our efforts to locate safety related defects and warn consumers of their existence are wasted if the vehicle is not ultimately repaired. It must be as attractive and convenient as possible for a consumer to invest the energy and the effort to get his or her vehicle fixed. At stake is not only the welfare of the owner of the vehicle himself, but also other persons who might be injured as a result of the defect.

Our experience over the past years has clearly demonstrated that owners of defective vehicles have a greater tendency to have their vehicles remedied if the manufacturer absorbs the repair cost. Statistics compiled by the National Highway Traffic Safety Administration indicate that in recall situations where the manufacturer has absorbed defect repair costs, about 75% of those owners who received notification had the vehicle inspected, and repaired where necessary. On the other hand, in the Corvair heater recall, where the manufacturer refused to absorb the cost of remedy, only 7.6% responded to the warning." *Report of the Senate Committee on Commerce on S. 355, Motor Vehicle Defect Remedy Act*, May 14, 1973.

[4] Vehicles involved in EPA ordered recalls have exhibited nonconformities at from 0 to 30,000 miles and from 0 to 3½ years (vehicles with very low mileages involved in recalls resulting from Selective Enforcement Audits) and on the average at 20,000 miles (this figure does not include vehicles recalled as a result of Selective Enforcement Audits). See Attachment 3.

[5] The investigations of 1976 GM vehicles of engine family 30H2J and 1977 GM vehicles of engine family 740J2 which resulted in our two most recent ordered recalls reveal that after a potentially nonconforming class is identified it takes approximately 9 months before a recall order is issued.

plan submitted and approved,[6] a great number of the vehicles would be beyond their useful lives (see Attachment 2). The following are a few illustrations of the kinds of delays that have been encountered in the recall process:

1) One manufacturer (see Attachment 4, p. 14, 15) requested additional time to develop a durable replacement component to use in a recall campaign. The manufacturer's remedial plan included a timetable which specified the time needed for each phase of the component development, including design, prototype bench testing, vehicle durability testing, tooling and parts production. Delays of several months occurred in each phase of the development so that by the time owner notification began, approximately 70,000 more vehicles had exceeded their useful lives than had exceeded their useful lives at the time the recall was first ordered.

2) One manufacturer requested additional time to develop a less expensive remedial repair part (see Attachment 4, p. 12). We provided this manufacturer with an additional four months to develop a remedial repair which was considerbly less expensive to implement than one that was available at the time of the recall order. This new plan resulted in a savings of $1.2 million to the manufacturer ($3.2 million if we include in the calculation the one million vehicles that the manufacturer volunteered to recall).

3) Another manufacturer (see Attachment 4, p. 6–8) agreed to conduct a sample recall and audit to provide EPA with assurance that certain carburetor and engine adjustments would be properly implemented by its dealerships when the nationwide recall occurred. The results of the first audit showed that a significant number of the vehicles were not

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[6] The average time from recall order to owner notification is 8½ months (this time period has ranged from 3½ to 20 months. In five additional cases where owner notification has not yet begun the time involved was from 2 to 4 years (see Attachment 4).

repaired properly. The results of a second audit, conducted after additional dealership training, showed no improvement in the ability of the mechanics to properly implement the remedial repair. The manufacturer then agreed to replace the carburetor on these vehicles. These delays have postponed the recall of these vehicles for over three years.

The problem of delay could be especially acute where a recall order is challenged in an administrative hearing.[7] By the time a hearing is concluded and subsequent appeals are exhausted, both within EPA and in the Federal courts, all vehicles involved would likely have exceeded their useful lives.

Of particular note is the recall of 1975 Chrysler vehicles with 360 and 400 cubic inch displacement (CID) engines (see Attachment 4, p. 4, 5). The recall order was issued on December 8, 1976. The order is now under consideration by the U.S. Court of Appeals for the District of Columbia Circuit and, at the earliest, a decision is expected by mid-1980 when many, if not all, of these vehicles will be beyond their useful lives.[8]

Furthermore, acceptance of the auto industry's interpretation might provide greater incentive to manufacturers to postpone the implementation of recall campaigns.[9] The reason

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[7] To date only one such hearing has been requested. However, because of our increased vehicle testing capability (see Attachment 5), we anticipate more recalls and possibly, more requests for hearings in the future. Also, if the industry's interpretation of its recall liability is accepted, manufacturers will have a greater incentive to request hearings.

[8] Chrysler requested this hearing within 45 days of the recall order. The Administrative Law Judge (ALJ) filed his decision on February 10, 1978, after extensive discovery and trial testimony, upholding the Administrator's determination of nonconformity. The Administrator's decision on Chrysler's appeal, upholding the ALJ's findings, was filed November 20, 1979. Chrysler's appeal to the U.S. Court of Appeals for the District of Columbia Circuit was argued on January 29, 1980.

[9] Delay also results in a reduction in the number of owners who respond to a recall campaign (see Attachment 6).

for this is clear; the greater the delay, the greater the number of vehicles which will be beyond their useful lives and therefore ineligible for repair at the manufacturer's expense.

A manufacturer could impede the progress of a recall campaign in numerous ways. One such method is to request an administrative hearing on the nonconformity determination. As has been discussed earlier, this would result in substantial delay. A manufacturer could also impede the remedial plan approval process by 1) submitting incomplete remedial plans, 2) failing to promptly furnish additional information necessary for the Agency's evaluation of the remedial plan, 3) negotiating minor disputed points endlessly and 4) delaying the manufacture of replacement parts necessary for remedial plan implementation.

In conclusion, as can be seen from the discussion above, the auto industry's interpretation of its recall liability under section 207(c) could severly limit the number of nonconforming vehicles which would be repaired pursuant to section 207(c)(1) due to the delays that are presently encountered in the recall process. Additionally, an adoption of the industry's position would encourage even greater delays in the implementation of future recalls thereby further limiting the number of vehicles which would receive the remedial repair. The failure to repair these vehicles could have significant effects on air quality. In addition, recalls provide the auto industry with an economic incentive to design vehicles which would comply with emission standards for *at least* their useful lives. The expense of recall, a function (in part) of the number of vehicles repaired, provides this incentive. It is often considerably less expensive to build-in part durability and conduct sufficient pre-production tests to assure that the part will perform for the life of the vehicle, than it is to subsequently repair the vehicle through a recall campaign. Therefore, the adoption of the auto industry's view of their recall liability would reduce the economic incentive to manufacturers to design vehicles which would meet emissions

standards for *at least* 5 years or 50,000 miles to the extent that large numbers of nonconforming vehicles were not repaired.[10]

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[10] Approximately 630,000 vehicles (1.4 million if there was 100% owner response rate) which were subject to ordered and voluntary recalls since 1973 would not have been repaired if the manufacturers' useful life limitation were in effect. These vehicles would have been beyond 50,000 miles or 5 years at the time of owner notification. (This figure was calculated using information provided in Attachments 2, 6 and 7).

Office-Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1098

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

GENERAL MOTORS CORPORATION,
Petitioner

v.

LEE M. THOMAS, Acting Administrator,
United States Environmental Protection Agency,
Respondent

AMICUS CURIAE BRIEF OF AUTOMOBILE IMPORTERS OF AMERICA, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Can interpretative rules be distinguished from legislative rules by examining the agency's intent rather than the rule's impact, so that the agency can expand the interpretative rule exception to the notice and comment requirement of the Administrative Procedure Act?

(2) Does due process preclude an interpretative rule from being promulgated and reviewed under §307(b) of the Clean Air Act, which denies judicial review in subsequent enforcement proceedings?

(3) Is it proper for a court to apply a deferential standard of judicial review when reviewing an interpretative rule adopted without notice and comment?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GENERAL MOTORS CORPORATION,
Petitioner

v.

LEE M. THOMAS, Acting Administrator,
United States Environmental Protection Agency,
Respondent

AMICUS CURIAE BRIEF OF AUTOMOBILE IMPORTERS OF AMERICA, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36 of the Rules of this Court,[1] Automobile Importers of America, Inc. ("AIA") respectfully submits this *amicus curiae* brief in support of the petition for a writ of *certiorari* filed by General Motors Corporation ("GM"). The writ should be granted because this case involves important questions of federal administrative law which have not been, but should be, settled by this Court, and because the decision of the D.C. Circuit conflicts with decisions of this Court and of other Courts of Appeals.

1. Written consents of counsel for both parties have been filed with the Clerk.

INTEREST OF AMICUS CURIAE AUTOMOBILE IMPORTERS OF AMERICA, INC.

AIA is a trade association organized as a non-profit District of Columbia corporation. Its Members are either manufacturer-authorized U.S. importers of motor vehicles or corporate affiliates of such importers.[2]

All motor vehicles imported into the United States must comply with emission standards established under the Clean Air Act (P.L. 88-206, 42 U.S.C. §§7401-7642, as amended). P.L. 88-206 §203(a)(1), 42 U.S.C. §7522 (a)(1). Moreover, under the Clean Air Act (hereinafter "the Act" or "CAA"), importers are considered to be manufacturers and must comply with the duties and responsibilities imposed on manufacturers by the Act. P.L. 88-206 §216(1), 42 U.S.C. §7550(1). An AIA Member must therefore recall a class of its vehicles upon an EPA determination that an emissions nonconformity exists in a substantial number of vehicles in that class. P.L. 88-206 §207(c), 42 U.S.C. §7541(c). The Act also prohibits AIA Members from refusing or failing to comply with the recall provisions of §207 (P.L. 88-206 §203(a)(4), 42 U.S.C. §7522(a)(4)), and in the event of a violation, AIA Members are subject to the Act's penalty provisions. P.L. 88-206 §205, 42 U.S.C. §7524.

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2. The Members of AIA are:

Alfa Romeo, Inc.
BMW of North America, Inc.
Fiat Auto U.S.A., Inc.
American Honda Motor Company, Inc.
American Isuzu Motors, Inc.
Jaguar Cars, Inc.
Lotus Performance Cars
Mazda Motors of America (Central) Inc.
Mitsubishi Motor Sales of America, Inc.
Nissan Motor Corporation In U.S.A.
Peugeot Motors of America, Inc.
Porsche Cars North America, Inc.
Renault USA, Inc.
Rolls-Royce Motors Inc.
Saab-Scania of America, Inc.
Subaru of America, Inc.
Toyota Motor Sales U.S.A., Inc.
Volvo North America Corporation

This litigation concerns the validity of an Environmental Protection Agency ("EPA") rule specifying a motor vehicle manufacturer's recall and repair obligations under the CAA (the "rule" or the "recall/repair rule"). AIA is interested in this action because it presents important questions regarding EPA rulemaking procedures and judicial review of EPA rules. The answers to these questions directly and significantly affect AIA Members.

The rule at issue was adopted by EPA without notice and comment as a "nationally applicable regulation" under §307(b) of the CAA (42 U.S.C. §7607(b)) ("§307(b)").[3] 40 C.F.R. §1803 app a, 45 *Fed. Reg.* 36,396 (May 30, 1980). The rule requires a manufacturer to repair a recalled vehicle free of charge even if the vehicle is beyond its statutory 5 year/50,000 mile useful life under 42 U.S.C. §7521(d)(1) at the time of repair.

The rule clearly affects AIA Members. First, it was promulgated as a "nationally applicable regulation" imposed on motor vehicle manufacturers, and AIA Members are thus required to comply with it. Second, because the rule specifies the class of vehicles which a manufacturer must repair free of charge, it defines a potentially significant economic burden imposed on AIA Members by the CAA's recall requirement.

The procedural issues in this case, however, are of particular concern to AIA. There are three questions of federal administrative law which affect AIA Members

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3. This section provides in relevant part:

(b)(1) A petition for review of . . . any . . . nationally applicable regulations promulgated . . . by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia . . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

and give rise to the need for Supreme Court review. They are: (1) what are the limits of the "interpretative rule exception" to the notice and comment requirement of the Administrative Procedure Act ("APA"); (2) does due process preclude the EPA from promulgating an interpretative rule under §307(b) of the CAA, because that section forecloses judicial review in subsequent enforcement proceedings;[4] and (3) what is the proper standard of review to be exercised by a court reviewing an interpretative rule adopted without notice and comment?

Because AIA Members are subject to EPA rules regulating the motor vehicle industry, they are directly affected by the rulemaking procedures used by that agency and are interested in protecting their right to participate in EPA proceedings through the notice and comment process. Because the rule at issue was labeled an "interpretative rule," it was promulgated without either the publication of a notice in the *Federal Register* or an opportunity for the public to comment. The agency's failure to provide notice and comment is particularly disturbing in this case because the recall/repair rule creates an obligation which is not set forth in the Act and which directly affects the costs of doing business of AIA Members (since it dictates the number of cars which a manufacturer must fix free of charge).

AIA Members also have a great interest both in preserving their right to judicial review of EPA rules (especially in enforcement proceedings) and in assuring that the courts apply the proper standard of review. This is especially true when, as here, the agency adopts a rule without notice and comment, thereby precluding comment by AIA Members at the administrative level.

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4. Section 307(b)(2) provides:

> (b)(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

By accepting EPA's contention that the rule was a "nationally applicable regulation" reviewable only under §307(b)(1) of the CAA, the D.C. Circuit's decision creates a rule of law in violation of AIA Members' due process rights. Because §307(b)(2) denies judicial review in enforcement proceedings, the court's opinion creates an unconscionable situation: AIA Members can be denied notice and comment during rulemaking and then can be precluded from challenging the validity of the rule when it is applied to them in subsequent enforcement actions.

Finally, despite the absence of notice and comment, the D.C. Circuit examined the EPA rule at issue under the very "narrow" or lenient standard of review applicable to rules adopted after notice and comment. If EPA can enjoy a deferential standard of judicial review with respect to a rule promulgated without notice or comment, AIA Members not only will be denied the right to a hearing before the agency, but also will be denied the right to meaningful judicial review. In this way, AIA Members will be denied not one, but two procedural safeguards which are the cornerstones of our system of administrative law.

SUMMARY OF ARGUMENT

In this case, the Court of Appeals for the District of Columbia Circuit decided three important questions of federal administrative law which have not been, but should be, decided by this Court. Moreover, this Court's decisions suggest that the D.C. Circuit decided these issues incorrectly.

Specifically, the D.C. Circuit began by approving the promulgation of a far-reaching administrative rule without the APA's normal notice and comment procedures. According to the Court of Appeals, the rule, although certainly an important expansion of the EPA's governing statute, was not legislative, but merely interpretative.

Having permitted EPA to avoid notice and comment, the D.C. Circuit also drastically limited the opportunity of the affected public to challenge the rule. The court upheld the rule as a nationally applicable regulation which could only be overturned by a challenge within sixty days of promulgation and could not be attacked in a subsequent enforcement proceeding.

Finally, despite the denial of both the opportunity to comment and the right to challenge the rule in later enforcement proceedings, the D.C. Circuit held that the proper standard of review in this case — the only challenge the rule would ever face — was the deferential standard developed by this Court in *Chevron USA v. NRDC*, ____U.S. ____, 104 S.Ct. 2778 (1984) (a case involving legislative regulations adopted after notice and comment). Each and all of these actions by the D.C. Circuit cry out for this Court's review.

Furthermore, the Court of Appeals decision conflicts with the opinions of other circuits on two important issues — the proper scope of the "interpretative rule exception" to the APA's notice and comment requirement and whether the *Chevron* standard should be applied by a court reviewing an interpretative rule. It is important for this Court to grant the requested writ of certiorari in order to settle these conflicts among the circuits.

REASONS WHY THE WRIT SHOULD BE GRANTED

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. What Are the Limits of the "Interpretative Rule" Exception to the APA's Notice and Comment Requirement?

The first question which should be decided by this Court concerns the scope of the "interpretative rule exception" to the notice and comment requirement of 5 U.S.C. §553. Under this section, an agency wishing to adopt a "legislative rule" must publish its proposal in the *Federal Register* and must provide the public with an opportunity to comment. Notice and comment need not be provided, however, if the rulemaking involves merely an "interpretative rule." Yet the APA fails to define the terms "interpretative rule" and "legislative rule." Over the years, the distinction between these two types of rules has been the subject of numerous, and at times conflicting, Court of Appeals decisions, as agencies have sought to avoid notice and comment. Only this Court can clarify which kinds of rules are legislative (and can be promulgated only after notice and comment) and which kinds are interpretative (and thus can be adopted in the absence of such procedures).

1. The Importance of the Question

In this case, EPA adopted, without notice and comment, a rule specifying motor vehicle recall and repair obligations that are not apparent on the face of the CAA. Moreover, even though the agency adopted the rule in response to a particular factual situation (a GM recall of 1975 Cadillacs), it made the rule applicable to all manufacturers in all cases, regardless of the facts involved. Nevertheless, the D.C. Circuit held that the rule was interpretative. If this is correct, notice and comment were indeed unnecessary. If EPA and the Court of Appeals were incorrect, the affected public was wrongfully deprived of its right to be heard.

The scope of the interpretative rule exception, however, is important for reasons beyond this case and even beyond EPA's regulation of the motor vehicle industry. To a large extent, the exception defines federal administrative procedure. Under the APA, legislative rulemak-

ing is the norm; interpretative rules are the exception. If courts are not mindful of decisions which expand the exception, at some point the exception — the absence of notice and comment — will become the norm. This not only would frustrate the intent of Congress in enacting the APA's notice and comment requirement, it also would infringe upon the affected public's constitutional right to be heard. *See Forrester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977); *Sierra Club v. Costle*, 657 F.2d 298, 392 n.462 (D.C. Cir. 1981) (regarding a Fifth Amendment right to notice and comment). The *en banc* D.C. Circuit in this case recognized the need for guidance in this area when it stated that the standards for distinguishing between interpretative and legislative rules are "enshrouded in considerable smog." *General Motors Corp. v. Ruckelshaus* 742 F.2d at 1561, 1565 (1984). It is thus important for this Court to define the limits of the "interpretative rule exception" to the APA's notice and comment requirements.

2. The Conflict among the Circuits

Guidance from this Court is also needed in order to resolve a split among the circuits created by the decision in this case. The test applied by the D.C. Circuit to determine whether a rule is interpretative or legislative conflicts with the tests that have been used by other Courts of Appeals. According to the D.C. Circuit, whether a rule is interpretative or legislative depends upon: (1) the agency's own label; and (2) whether the agency *intended* to create new law. 742 F.2d at 1565. Other Circuits have enunciated different tests, all of which seem to focus on the *actual impact* of the rule, regardless of the agency's intent:

> (i) *Eighth Circuit:* Whether a rule is legislative or interpretative depends upon the *impact* on the affected parties. *American Bancorp. v. Board of Gov-*

ernors of Federal Reserve System, 509 F.2d 29, 33 (8th Cir. 1974).

(ii) *Ninth Circuit:* Legislative rules are those which effect a change in existing law or policy, create new law, and impose general, extra-statutory obligations pursuant to authority delegated by the legislature. Interpretative rules "go more to what the administrative officer thinks the statute ... means" and "are used more for discretionary fine-tuning than for general law making." *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984).

(iii) *Tenth Circuit:* An interpretative rule is merely a clarification or explanation of an existing statute or rule while a legislative rule effects a policy change. *First Bancorporation v. Board of Governors of Federal Reserve System*, 728 F.2d 434, 438 (10th Cir. 1984).[5]

The D.C. Circuit has expressly declined to use the substantial impact test for distinguishing between legislative and interpretative rules. *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982).

The court below focused on whether an agency *intends* a rule to create new rights and duties rather than on whether the rule *in fact* does so. Under this "intention test," the D.C. Circuit found the recall/repair rule to be interpretative and not legislative. 742 F.2d at 1565. The

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5. Professor Davis has discussed another test to distinguish between legislative and interpretative rules. Where the agency acts under a specific power, the rule is legislative. A rule is interpretative when there is no such delegation and the agency acts only upon its inherent power to issue rules interpreting its enabling statute. K. Davis, *Administrative Law Treatise*, §7.8 (2d ed. 1979 & Supp. 1982). Petitioner sets forth a more exhaustive discussion of the various tests the numerous Circuits have devised. *See* GM's Petition at pp. 9-15.

opposite result would attain under the "impact test," however, due to the recall/repair rule's significant effect on the duties of motor vehicle manufacturers.

This Court has never definitively explained the difference between legislative and interpretative rules. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979), the Court seemed to endorse the "creation of new rights" or "impact test" when it stated that an inherent characteristic of a legislative rule is that it "affect[s] individual rights and obligations." *See also Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The guidance and direction of this Court is needed in order to settle the conflict among the circuits and to establish a test for distinguishing these two types of rules upon which our system of administrative law is based.

B. Does Due Process Preclude an Interpretative Rule from Being Promulgated and Reviewed under §307(b) of the Clean Air Act Because That Section Denies Judicial Review in Subsequent Enforcement Proceedings?

Under §307(b)(1) of the CAA, a petition for judicial review of any EPA rule promulgated as a "nationally applicable regulation" must be filed in the D.C. Circuit within sixty days from the date the rule is published in the *Federal Register*.[6] Section 307(b)(2) then states that an EPA action which could have been reviewed under §307(b)(1) is not subject to judicial review in civil or criminal proceedings for enforcement.

In this case, EPA maintained that the recall/repair rule was a nationally applicable regulation and was reviewable only under §307(b)(1). The agency's *Federal Register* notice stated:

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6. If such a petition is based solely on grounds occurring after such sixtieth day, however, the petition may be filed within 60 days after such grounds arise. §307(b)(1).

> NOTE: This rulemaking constitutes a "nationally applicable regulation" under Section 307(b)(1) of the Clean Air Act, as amended. 42 U.S.C. §7607(b)(1). Any judicial review of this section is, accordingly, governed by that provision.

45 *Fed. Reg.* 36,396 (May 30, 1980).

EPA's brief before the D.C. Circuit was consistent with its *Federal Register* notice. The agency argued that the recall/repair rule was an interpretative rule and that such rules can be promulgated as "nationally applicable regulations" which: (1) can be reviewed only by the D.C. Circuit; (2) can be reviewed only by a petition for review filed within 60 days of promulgation; and (3) under §307(b)(2), cannot be challenged in subsequent enforcement actions. EPA brief at pp. 42-46.

The D.C. Circuit agreed with EPA and sustained the rule. The court thus held that interpretative rules can be promulgated under §307(b)(1) and that such rules are reviewable only under that section. As a result, interpretative rules are now subject to the denial of judicial review set forth in §307(b)(2) (*i.e.*, they cannot be attacked in subsequent enforcement actions).

This situation is contrary to the "traditional notions of fair play and substantial justice" on which our legal system is based.[7] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[8] If a rule is promulgated without notice and comment, the Fifth Amendment should guarantee any party the right to challenge the rule in a subsequent enforcement action. Due process should therefore prohibit promulgation and review of interpre-

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7. The Court of Appeals decision also flies in the face of one of the basic tenets of administrative law — that interpretative rules have no binding effect and are not controlling upon a court (such as when a court is hearing an enforcement action). 2 K. Davis, *Administrative Law Treatise*, §§7.8-7.13 (2d ed. 1979 & Supp. 1982).

8. *See also Goss v. Lopez*, 419 U.S. 565, 574 (1975), where the Court speaks of the constitutional requirement of administrative procedures to be "fundamentally fair".

tative rules under §307(b) because of that section's preclusion of judicial review in later enforcement proceedings.[9]

The denial of judicial review set forth in §307(b)(2) raises serious constitutional questions when applied to a rule, such as the recall/repair rule, which is adopted without notice and comment. Two examples are enough to make these constitutional questions obvious:

> 1. An interpretative rule is promulgated under §307(b)(1); a party is not yet in the business affected by the rule and thus fails to challenge the rule within 60 days; EPA then takes the position that the party is barred from challenging the rule in an enforcement action years later.
>
> 2. EPA promulgates an interpretative rule under §307(b)(1); a party institutes an action for review commenced within 60 days; EPA prevails in that action and then takes the position that *another* party is precluded from attacking the rule in a subsequent enforcement action.

One Justice of this Court has expressed doubt about the constitutionality of § 307(b)'s limitation on judicial review when applied to rules adopted *with* notice and comment. Justice Powell has noted that there is a serious question as to whether a party can be precluded by §307(b) from challenging an EPA *legislative* rule, especially if the person did not realize that the rule had been promulgated because he had not read the *Federal Reg-*

9. It would thus seem that by finding the rule to be interpretative and then upholding it on the merits the D.C. Circuit erred in one of two significant ways. The Court either (1) was wrong in finding the rule to be interpretative; *or* (2) properly found the rule to be interpretative, but failed to recognize that due process prevented it from exercising jurisdiction under §307(b). In the latter case, the D.C. Circuit lacked subject matter jurisdiction to review the merits and the proper forum for GM's challenge was perhaps a United States District Court.

ister notice.[10] *See, e.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289 (1978) (Powell, J., concurring) ("If the constitutionality of the validity of §307(b) of the Clean Air Act had been raised. . . , I think it would have merited serious consideration."); *Harrison v. PPG Industries*, 446 U.S. 578, 594 (1980) (Powell, J., concurring) ("I continue to have reservations about the constitutionality of the notice and review preclusion provisions of §307(b).").[11] Surely this constitutional question is even more serious where, as here, *opportunity for notice and comment is not provided.*[12]

It is necessary for this Court to establish that the denial of judicial review set forth in §307(b)(2) cannot apply to interpretative rules, and thus that such rules cannot be promulgated or reviewed under §307(b)(1). Indeed, the Court should take this opportunity to strike down §307(b)(2) as unconstitutional. The Court should confirm that due process guarantees any person the right to challenge an administrative rule (and especially an interpretative rule) in judicial enforcement proceedings, irrespective of whether suit was previously brought against the rule by another party and irrespective of the outcome of any such suit.

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10. This question also arises in the situation where at the time of a rule's promulgation a person has not yet even established a business affected by the rule and thus had no reason to be interested in the *Federal Register* notice.

11. In *Harrison*, this Court discussed EPA "final actions" that are reviewable under §307(b)(1). The Court did not address, however, either the reviewability under § 307(b)(1) of an interpretative rule promulgated as a "nationally applicable regulation" or the constitutionality of § 307(b)(2).

12. The existence of this substantial constitutional question has also been recognized by the lower courts. *Chrysler Corp. v. EPA*, 600 F.2d 904, 912-13 (D.C. Cir. 1979) (acknowledging a "nagging presence of a substantial due process question" with respect to a provision of the Noise Control Act of 1972 virtually identical to §307(b) of the CAA); *NRDC v. EPA*, 673 F.2d 400, 406 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 879 (1983) (noting the same constitutional question arising under the Clean Water Act).

C. If a Rule Is Promulgated under the Interpretative Rule Exception to the APA's Notice and Comment Requirement, What Is the Proper Standard of Review To Be Exercised by a Reviewing Court?

This Court recently held that a highly deferential standard of review is appropriate when a court reviews a *legislative rule* promulgated *after notice and comment*. *Chevron USA v. NRDC*, *supra*. The case at bar presents the question of whether such deference is proper when the subject of a court's review is an interpretative rule which was promulgated without notice and comment. Although there was absolutely no suggestion in *Chevron* that deference is proper in such cases, the D.C. Circuit nonetheless held that the *Chevron* standard is indeed appropriate when reviewing interpretative rules.

1. The Importance of the Question

The D.C. Circuit's application of the *Chevron* standard of review in this case (742 F.2d at 1566-67) is in direct conflict with prior decisions of this Court regarding the proper standard to be used when reviewing interpretative rules. In *Skidmore v. Swift*, 323 U.S. 134, 140 (1944), this Court stated:

> [t]he rulings, interpretations and opinions of the Administrator . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

This Court has further stated that guidelines (*i.e.*, interpretative rules promulgated without legislative authority) should be accorded less weight by a reviewing court than regulations which Congress has declared are to have the force and effect of law (*i.e.*, legislative rules). *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976), *citing Standard Oil Co. v. Johnson*, 376 U.S. 481, 484 (1942) (interpretative rules are reviewable under the *Skidmore* standard).

If the D.C. Circuit's holding stands, a party denied notice and comment by an agency will find its right to judicial review "limited to the narrower inquiry into whether the agency's [rule] was 'sufficiently reasonable' to be accepted." 742 F.2d at 1567. This situation threatens two of the most important procedural due process safeguards that our system of administrative law has developed and that our Constitution guarantees: the right to be heard and the right to meaningful judicial review. This Court should therefore confirm that the *Chevron* standard is not applicable to judicial review of interpretative rules.

2. The Conflict among the Circuits

The standard of review used by the D.C. Circuit in this case also conflicts with the standards applied by other Circuits when reviewing other interpretative rules. First, the D.C. Circuit's decision to extend the deferential *Chevron* standard to review of interpretative rules is in direct conflict with the recent decision in *Capitano v. Secretary of Health & Human Services*, 732 F.2d 1066, 1076 (2d. Cir. 1984). The Second Circuit expressly held in that case that the *Chevron* standard is *not* applicable to interpretative rules.

Second, there is a substantial body of pre-*Chevron* case law from numerous Courts of Appeals to the effect that the standard of review for interpretative rules is more stringent than the standard for legislative rules.

There is also nothing in the *Chevron* decision which suggests that those earlier decisions are invalid.

For example, the 11th Circuit has stated that "an agency's interpretative rules are accorded less deference than its legislative rules." *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1329 (11th Cir. 1983). The Fifth Circuit has taken the same position. *Shell Oil Co. v. FPC*, 491 F.2d 82, 88 (5th Cir. 1974). Indeed, prior to the Chevron decision, the D.C. Circuit itself recognized that interpretative rules are subject to a greater scrutiny than legislative rules. *National Distributing Co. v. United States Treasury Department*, 626 F.2d 997, 1019 (D.C. Cir. 1980).

There is thus an irreconcilable split between Circuits with respect to the applicability of the *Chevron* standard of review to interpretative rules. The D.C. Circuit opinion also conflicts with pre-*Chevron* decisions of both this Court and other Courts of Appeals. It is therefore necessary for this Court to settle the important question of whether the *Chevron* or *Skidmore* standards should be applied when a court reviews an interpretative rule.

CONCLUSION

For the foregoing reasons, General Motors' petition for a writ of *certiorari* should be granted.

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No. 84-1098

In the Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION, PETITIONER
v.
LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a rule issued to express the Environmental Protection Agency's interpretation of Section 207(c)(1) of the Clean Air Act, 42 U.S.C. 7541(c)(1), was an "interpretative" rule and therefore properly issued without notice and opportunity for comment.

2. Whether the court of appeals correctly sustained the interpretative rule at issue as a reasonable interpretation of Section 207(c)(1) of the Clean Air Act.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. A1-A48) is reported at 742 F.2d 1561. The vacated opinion of the court of appeals panel (Pet. App. B1-B67) is reported at 724 F.2d 979.

JURISDICTION

The judgment of the court of appeals (Pet. App. D1) was entered on September 7, 1984. By order dated November 29, 1984, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 7, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In an effort to mitigate the harm to human health and the environment caused by air pollution resulting from motor vehicles, Congress enacted Title II of the Clean Air Act of 1970, 42 U.S.C. 7521 *et seq.* Section 202 of the Act, 42 U.S.C. 7521, requires the Administrator of the Environmental Protection Agency to prescribe emission standards that motor vehicles must meet during their useful lives. Section 202(d)(1) of the Act, 42 U.S.C. 7521(d)(1), provides that the useful life of a passenger car is five years or 50,000 miles, whichever first occurs.

Under Section 206 of the Act, 42 U.S.C. 7525, the Administrator may require new motor vehicles to be tested prior to sale to determine whether they conform to the emission standards prescribed by Section 202. Aware that presale tests would not be adequate to ensure that vehicles continue to meet the emission standards while in actual use, Congress also enacted warranty and recall provisions applicable to vehicles after their sale to consumers. See 116 Cong. Rec. 33093 (1970) (statement of Sen. Muskie). The warranty provisions, found in Section 207(a) and (b), 42 U.S.C. 7541(a) and (b), provide for the repair of isolated, individual vehicle failures. The recall provision of Section 207(c), 42 U.S.C. 7541(c), at issue in this litigation, provides a remedy when substantial numbers of vehicles in a given production class exceed emission standards.

Specifically, Section 207(c)(1) provides that if the Administrator determines that a substantial number of a class of vehicles, although properly maintained and used by consumers, fail to conform to federal emission standards while in actual use throughout their useful lives, he shall notify the manufacturer of the nonconformity. Section 207(c)(1) then requires the manufacturer to submit, for EPA's approval, a remedial plan to recall and repair the nonconforming vehicles in the class at the manufacturer's expense.

2. EPA began investigating 1975 Cadillacs (of engine family 60V43) in May 1975 when assembly line data indicated that a significant carbon monoxide (CO) problem might exist in those vehicles. By mid-1976, EPA had gathered and informed petitioner, General Motors Corporation, of additional evidence that the Cadillacs were emitting, in actual use, CO substantially in excess of the federal standard. These findings were confirmed between November 1976 and January 1977, when petitioner conducted retests of some of the vehicles sampled by EPA. Pet. App. B4-B5.

On March 21, 1977, the Administrator notified petitioner that he had determined that a substantial number of 1975 Cadillacs (of engine family 60V43 with carburetor part No. 7045230), although properly maintained and used, failed to meet the federal CO emission standard within their useful lives. Accordingly, the Administrator required petitioner to submit a remedial plan for that class of vehicles. Pet. App. A4.

Initially, petitioner submitted a plan for a voluntary recall of the 1975 Cadillacs; that plan "specifically provided that '[a] vehicle affected will be eligible for repair under the remedial plan, regardless of vehicle age, mileage, or owner' " (Pet. App. A4-A5 & n.2). EPA did not approve the proposed plan, however, and negotiations continued for two years between EPA and petitioner over the effectiveness of the proposed plan and petitioner's obligation to audit the performance of completed repairs (*id.* at A4-A5). In December 1979, EPA withdrew its demand that petitioner conduct an audit of the repairs mandated by the recall, informed petitioner of its intent to conduct its own audit, and approved the proposed remedial plan (*id.* at A5).

Shortly thereafter, however, petitioner informed EPA for the first time that it would exclude from the plan all nonconforming vehicles that were beyond their five-year/50,000 mile useful lives at the time presented for repair

(Pet. App. A5 & n.4). Subsequently, EPA published, on May 30, 1980, an interpretative rule setting forth its established interpretation that Section 207(c)(1) requires a manufacturer to remedy, at its expense, all vehicles in a recalled class if those vehicles have been properly maintained and used and have experienced a nonconformity during their useful lives, regardless of their age or mileage at the time presented for repair (45 Fed. Reg. 36396; Pet. App. E1-E9). On June 23, 1980, in keeping with this interpretation, the Administrator partially disapproved a remedial plan submitted by petitioner, because the plan excluded vehicles that might have experienced a nonconformity during their useful lives but would exceed five years/50,000 miles at the time presented for repair (Pet. App. A6).

2. Petitioner sought review in the United States Court of Appeals for the District of Columbia Circuit of the May 1980 interpretative rule, and petitioner also sought review of the Administrator's partial disapproval of the Cadillac remedial plan. The court of appeals consolidated the two petitions for review. Pet. App. A6 & n.5.

a. On December 16, 1983, a divided panel of the court of appeals issued an opinion vacating the agency's interpretative rule and final order of disapproval (Pet. App. B1-B67). Senior Judge Bazelon, writing for the majority, held that under Section 207(c)(1) of the Clean Air Act, an automobile manufacturer is not responsible for the repair of recalled vehicles that are beyond their useful lives at the time presented for repair. The panel reached this conclusion even as it admitted that its "holding may impede the enforcement of emission standards even for cars within their useful lives" and that the "recall system may be rendered useless" (Pet. App. B39). Judge Wilkey filed a concurring opinion setting out four possible constructions of Section 207(c)(1) and identifying the construction he believed best comported with the statute and the legislative

history (Pet. App. B43-B46). Judge Wald, in dissent, stated that the panel's decision invalidating EPA's interpretative rule had overstepped appropriate bounds for judicial review of an enforcement agency's reasonable statutory interpretation and that the panel's decision would permit automobile manufacturers to circumvent, in whole or in part, Section 207's recall and repair obligations through a strategy of engaging in prolonged litigation (Pet. App. B47-B67).

b. The court of appeals granted the government's suggestion for rehearing en banc. Judge Wald, this time writing for an eight-judge majority, sustained the agency's interpretative rule and final order (Pet. App. A1-A23). The en banc court held that EPA's actions were consistent with the language, legislative history, and purposes of the Clean Air Act (*ibid.*). Senior Judge Bazelon, joined by Judges Tamm and Wilkey, dissented (*id.* at A24-A48).

ARGUMENT

The decision of the en banc court of appeals, characterized by petitioner as raising an issue of "first impression" (Pet. 3), is correct and does not conflict with any decision of this Court. Moreover, petitioner has failed to demonstrate that acceptance of its arguments by this Court would alter the result reached by the court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly ruled — and on this issue the en banc court was unanimous — that EPA's May 30 rule was an interpretative rule (Pet. App. A7-A10, A24 n.3). Hence, the rule is not void for failure to follow the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553(b)(A).[1]

[1]The APA exempts from its notice and comment procedures "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" (5 U.S.C. 553(b)(A)). The rulemaking provisions of the Clean Air Act incorporate this provision of the APA (42 U.S.C. 7607(d)(1)).

Although petitioner contends that considerable confusion exists regarding the distinction between interpretative and legislative rulemaking, EPA's May 30 rule is a classic example of an interpretative rule. An interpretative rule simply states what the administrative agency thinks the statute means; it only " 'reminds' affected parties of existing duties." *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 876 & n.153 (D.C. Cir. 1979). See generally *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977); U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947).[2]

The May 30 rule fits the accepted definition of an interpretative rule perfectly. All that it does and all that it purports to do is set forth EPA's interpretation regarding a manufacturer's recall liability under Section 207(c)(1). See 45 Fed. Reg. 36396 (1980); Pet. App. E1. Indeed, petitioner's principal challenge to the May 30 rule — that EPA has misinterpreted the scope of a manufacturer's liability under Section 207(c)(1) — in effect characterizes the rule as interpretative. The only "requirement" of the May 30 rule is to remind manufacturers of their statutory obligation to submit plans, when ordered to do so, that conform to EPA's interpretation of Section 207(c)(1). It is a manufacturer's refusal to comply with a recall order issued under the statute, and not its refusal to comply with the interpretative rule, that is punishable by the statute.

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[2]In *Steadman* v. *SEC*, 450 U.S. 91, 103 n.22 (1981), the Court observed:

> We have previously noted that the Attorney General's Manual on the Administrative Procedure Act (1947) has been "given some deference by this Court because of the role played by the Department of Justice in drafting the legislation," *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. at 546, and Justice Clark was Attorney General both when the APA was passed and when the Manual was published.

Thus, the May 30 rule did not create any new rights or duties; it simply restated the consistent agency practice in conducting recalls pursuant to Section 207(c)(1). As the rule itself explains, "[i]n the past, manufacturers have not conditioned a vehicle's eligibility for recall repair * * * on the basis of the vehicle's age or mileage" (Pet. App. E2). Not until petitioner announced in February 1980 that it would exclude older cars from the remedial plan that it had previously proposed did EPA find it necessary to publish its interpretation of Section 207(c). See Pet. App. A8-A10 n.7.

Although petitioner contends (Pet. 13) that review should be granted because the various circuits sometimes employ different formulations to distinguish legislative rules from interpretative rules, those differences, even assuming they exist, are not material here, because EPA's May 30 rule would be considered interpretative under any established test. Moreover, petitioner has failed utterly to demonstrate how its own proposed test (*id.* at 13-15) would produce a different result in this case. Petitioner apparently would employ a three-factor analysis. First, it would look to congressional intent; under this factor, "rules that essentially restate or explain Congress' intent may fairly be considered interpretative" (*id.* at 13 (footnote omitted)). As we explain later in this brief (see pages 12-15, *infra*), EPA's May 30 rule did exactly that.

Second, petitioner would consider (Pet. 14) whether an agency's regulation involves significant policy determinations; if it does, petitioner would characterize the rule as legislative. Here, EPA's May 30 rule did not, and did not purport to involve any significant policy determination not already made by Congress. To be sure, petitioner argues that the rule "expands" the liability of manufacturers under Section 207(c)(1) (Pet. 20-21, 27). But the recall plan requirement described in the May 30 rule is mandated by Section 207(c)(1) itself, and merely clarifies and restates

EPA's long-standing interpretation of the statutory obligation for a class-based recall and repair without regard to the age or mileage of each vehicle when presented for repair. Thus, petitioner's dispute with the agency is merely about the meaning of the statutory provision itself. Since the rule does not purport to "expand" the liability of manufacturers beyond that provided in the statute itself, it would not be legislative even under petitioner's own analysis.

Finally, petitioner would consider whether an agency's regulation has a " 'substantial impact' " on individual rights and liabilities (Pet. 14-15). Again, EPA's May 30 rule does not constitute a legislative rule under petitioner's own "substantial impact" analysis. It was the statutory requirements of Section 207(c) itself, of which petitioner merely was "reminded" by the May 30 rule, that had a "substantial impact" on automobile manufacturers.[3] In sum, petitioner's

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[3]Petitioner claims (Pet. 27-29) that if the court of appeals' decision upholding the interpretative rule is allowed to stand, manufacturers' liability for recalls will increase dramatically. Petitioner also suggests (*id.* at 27) that recalls have escalated greatly since the interpretative rule was published in 1980 and, therefore, that the number of older vehicles eligible for repair under the rule also is growing. These claims are both inaccurate and irrelevant.

Petitioner's argument, once again, is premised on the erroneous assumption that the interpretative rule exceeded the intended scope of Section 207(c)(1) of the Act by making manufacturers liable for recall and repair of nonconforming vehicles that are past their statutory useful lives. However, as the court of appeals correctly concluded, the interpretative rule "did not create any new rights or duties," but merely restated "the consistent practice of the agency in conducting recalls pursuant to section 207(c)" (Pet. App. A8). Moreover, the court concluded that EPA's interpretation was amply supported by the language, legislative history, and purposes of Section 207(c)(1), as well as by relevant case law (Pet. App. A13, A16, A17 & n.12, A20-A22). Therefore, whatever number of vehicles may be recalled in the future, that number will be due to the implementation of purely statutory requirements and not to the interpretative rule.

In addition, petitioner is simply wrong in suggesting that the number of vehicles recalled has risen drastically since 1980. Contrary to

own approach to the legislative/interpretative rulemaking dichotomy shows that there is no need for further review of the unanimous judgment of the en banc court of appeals that the May 30 rule was an interpretative rule.

2. Petitioner next contends (Pet. 21-26) that the court of appeals compounded its alleged error when, after determining that the May 30 rule was interpretative rather than legislative, the court applied the "highly deferential" (*id.* at 21) standard of review articulated in *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), to its review of the May 30 rule. Petitioner's argument is erroneous.

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petitioner's assertion (Pet. 27), the total number of vehicles recalled in 1979 (before the interpretative rule was issued) was not 837,000, but approximately 2.5 million. Petitioner's calculations of vehicles recalled in 1979 and 1983 purportedly were derived from Attachment 7 to an EPA Staff Memorandum of May 9, 1980. Pet. 27 n.31. That memorandum is included in the appendix to the petition (Pet. App. H1-H8), although Attachment 7 is not. In any event, Attachment 7 (which is part of the record below) clearly indicates that the total number of vehicles recalled in 1979 was about 2.5 million. This figure includes voluntary as well as mandatory recalls, as does the 1983 total of 3 million that petitioner uses for comparison purposes. (Interestingly, petitioner has not mentioned that Attachment 7 also shows that the total number of vehicles recalled in 1978 likewise was about 2.6 million.) These figures are not dramatically different from the 1983 total of 3 million vehicles (correctly cited by petitioner) and demonstrate that the total number of vehicles recalled and, therefore, the impact of the interpretative rule on the total number of vehicles eligible for repair, is not rising substantially.

In any event, petitioner has failed to show how the number of vehicles recalled in any given year is even relevant to the questions whether EPA has correctly interpreted the statute and whether the court of appeals properly upheld that interpretation. Since the interpretative rule merely restated EPA's long-standing and consistent application of Section 207(c)(1) (see Pet. App. A3, A8 & n.7), the rule itself (whether or not the underlying interpretation is correct) could not be the cause, per se, of any increase in recalls. For the same reason, the number of vehicles recalled before and after the interpretative rule was issued has no bearing on whether EPA properly interpreted the statute in the first place.

First, petitioner seems to proceed on the assumption that the principle of deference to administrative expertise applied in *Chevron* established new law. As the Court explicitly recognized, however, the principle is of long-standing vintage. *Chevron,* slip op. 6-7 & n.14.[4] Thus, the court of appeals cited *Chevron* only for the well-established proposition that a reviewing court may not substitute its judgment for that of the agency if the agency's interpretation is "sufficiently reasonable" (Pet. App. A11 (citation omitted)). See also *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *United States* v. *Shimer,* 367 U.S. 374, 381-382 (1961). Although it is true that *Chevron* involved judicial review of legislative rulemaking, nothing in the opinion purports to limit the traditional deference principle to such cases, nor to alter the well-established proposition that "the interpretation given [a] statute by the officers or agency charged with its administration" is entitled to substantial deference. *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 566 (1980) (quoting *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978)).

Second, the court of appeals did not in any event substitute blind "deference" to EPA for its own review of the statute and its legislative history. Instead, the court reviewed the contentions of the parties at length (Pet. App. A12-A22) and concluded that EPA's position found "substantial support, *and no contradiction,* in the language and legislative history of section 207 of the Clean Air Act" (*id.* at A11 (emphasis added)). In these circumstances, even the

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[4]Although the principle is by no means new, it undoubtedly has taken on increasing importance — indeed, necessity — with the advent of extraordinarily technical and complex statutes such as the Clean Air Act. Cf. *Chemical Manufacturers Ass'n* v. *NRDC,* No. 83-1013 (Feb. 27, 1985), slip op. 8-9. Petitioner has not identified any compelling reason for ignoring this reality in the instant case.

most minimal degree of deference to administrative expertise would require upholding the agency's interpretation.

Finally, petitioner again has failed to explain how the outcome of this case would have been any different if, instead of citing *Chevron,* the court of appeals had applied the standard enunciated in *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944). On the contrary, the court of appeals explained at length (see, *e.g.,* Pet. App. A8-A11 n.7) the basis for its conclusion that EPA's interpretation of Section 207 was longstanding, consistent, and the product of the agency's specialized expertise. Thus, the court's validation of the agency's interpretation rested on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade * * *." *Skidmore,* 323 U.S. at 140.[5]

3. Although petitioner lists the court of appeals' ultimate determination to sustain the agency's May 30 rule as a question presented by the petition (Pet. i), petitioner has not discussed that issue in the petition itself. Accordingly, we set forth here only a brief description of the merits of the

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[5]Petitioner contends (Pet. 26) that the courts of appeals are in conflict over the applicability of *Chevron's* principle of deference to interpretative rules. The conflict, if any, is quite illusory. For example, *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n,* 742 F.2d 1, 11 (1st Cir. 1984), did not even involve an interpretative rule; instead, the court refused to defer to the interpretations of the agency's General Counsel, "contained only in his brief." And in *Capitano* v. *Secretary of Health and Human Services,* 732 F.2d 1066, 1076 (2d Cir. 1984), the court refused to defer to the agency upon concluding that the agency's interpretation was inconsistent with the spirit of the statute. In the instant case, by contrast, the court of appeals expressly concluded (Pet. App. A20-A22) that the May 30 rule furthers the purposes of Congress in enacting the Clean Air Act. There is nothing in the opinion to suggest that the court would have accorded undue deference to the agency's interpretation had it concluded otherwise.

controversy, sufficient to demonstrate that the court of appeals was correct in upholding the agency's May 30 rule.

a. EPA's interpretative rule simply follows the statutory directive enacted by Congress in Section 207(c), which mandates a class-based approach to recalls. Section 207(c) reads, in pertinent part:

> (1) If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title, when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. * * *
>
> (2) Any notification required by paragraph (1) with respect to any class or category of vehicles or engines shall be given to dealers, ultimate purchasers, and subsequent purchasers (if known) in such manner and containing such information as the Administrator may by regulations require.

Thus, the statute requires that notification of a recall go to owners of all vehicles within an entire class, without distinction among individual vehicles. The statute further requires a manufacturer to remedy the nonconformity "of the vehicles with respect to which * * * notification is given," *i.e.*, every nonconforming vehicle within the entire class of vehicles, with but one exception for vehicles that have not been "properly used and maintained." Otherwise,

the statutory language on its face allows no exception to a manufacturer's obligation to repair all vehicles within a particular recalled class that exceeded the standards during their useful lives.

The interpretative rule tracks the statute, by focusing on a class of vehicles. The rule clarifies that the manufacturer's remedial obligation includes all the vehicles within the class that exceed standards during their useful lives, even if they are beyond their useful lives at the time presented for repair, since it is clear that even such older vehicles are within the class for which notification was given.[6]

In short, if a class of vehicles fails to conform to the standards during the useful life of those vehicles, the obligation to recall and repair the class does not end as individual vehicles cross the five-year/50,000 mile threshold. The fact remains that vehicles in the class failed to meet the standards during their useful lives. The nonconformity of the class can be corrected only by repairing each nonconforming vehicle in the class, as the statute and the interpretative rule require.

Petitioner's interpretation of Section 207 would effectively rewrite the statute. Under petitioner's reading, manufacturers would be required "to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given[,]" *except for those vehicles that will have passed beyond their useful lives at the time presented for repair.* The remedial plan would "provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer[,]" *except for those vehicles*

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[6]A manufacturer is not liable for repairs to the extent it can affirmatively demonstrate that a particular vehicle within the recalled class did not exceed the standards during its useful life.

that have passed beyond their useful lives at the time presented for repair. If Congress had intended this scheme, it easily could have drafted the statute in this fashion. Accordingly, the court of appeals properly declined petitioner's invitation to interpret the statute as if Congress had enacted such a limitation. See, *e.g., Grove City College* v. *Bell,* No. 82-792 (Feb. 28, 1984), slip op. 8.[7]

b. EPA's interpretative rule also is fully consistent with the purposes of the Clean Air Act in general and Section 207(c) in particular. One of the principal purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" (42 U.S.C. 7401(b)(1)). EPA's interpretation of Section 207 advances that purpose by ensuring that manufacturers retain the incentive to design pollution control equipment that will last the full useful life of five years or 50,000 miles. Petitioner's interpretation, on the other hand, would allow manufacturers to breach that requirement and escape the consequences. For example, a manufacturer could employ an emission control system that would function only for 40,000 miles, knowing that by the time EPA sampled a "substantial number" of high-mileage cars to discover the defect and institute recall proceedings, most (if not all) of the vehicles in the class would have passed the 50,000-mile mark. In addition, manufacturers could limit their liability substantially by delaying administrative recall proceedings and engaging in protracted litigation after a nonconformity was discovered, so that most (if not all) of the vehicles in the class would have exceeded their useful lives before being presented for repair. Thus, the public would be forced to

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[7]The court of appeals discussed the legislative history of Section 207 at length and demonstrated that it fully supports EPA's interpretation of the statute. See Pet. App. A16-A20. Accordingly, we will not repeat that discussion here.

bear the burden of this additional increment of air pollution without effective recourse through the mechanism of Section 207(c). The courts will not "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *American Textile Mfrs. Inst., Inc.* v. *Donovan,* 452 U.S. 490, 513 (1981) (citations omitted). Accordingly, EPA's interpretation of Section 207 fully comports with, and does not exceed, the expressed intent of Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner,

v.

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

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OCTOBER TERM, 1984

No. 84-1098

GENERAL MOTORS CORPORATION,
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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

With consent of the parties, the National Association of Manufacturers (NAM) files this brief in support of the Petitioner. The NAM is a non-profit voluntary business association incorporated under the laws of the state of New York. The NAM represents approximately 13,500 companies, large and small, located in every state. Further, NAM is affiliated with an additional 158,000 businesses through the Associations Council and the National

Industrial Council. The membership of the NAM represents an estimated 80 percent of all goods manufactured in the United States.

The NAM and its members are affected by the federal regulatory policy process involving virtually all government agencies and departments. Both the NAM and its members often file comments on proposed agency regulations. The Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, is the statute that governs whether a regulation is legislative or interpretive and prescribes whether public comment is required. The NAM believes that the Court of Appeals for the District of Columbia Circuit has erred in the instant case in its evaluation of the nature of the rule at issue and has misinterpreted the application of a recent Supreme Court decision. We believe there is great precedential risk that this decision will affect all federal district and circuit courts and result in foreclosing participation in the administrative process. Because of the vast and diverse involvement of NAM members nationwide with all government entities, this decision may have an adverse impact on the NAM membership. For this reason, the NAM submits the following arguments to the Court in support of the Petitioner.

SUMMARY OF THE CASE

In March of 1977, the Environmental Protection Agency (EPA) ordered General Motors Corporation (GM) to recall certain automobiles pursuant to its authority under the Clean Air Act. 42 U.S.C. § 7401 *et seq.* Following various administrative activities and negotiations, the EPA in 1980 accepted the recall plan offered by GM in 1977. However, GM indicated that certain automobiles would not now be recalled because they were beyond the five year, 50,000 mile useful life limitation that was required for repairs. On May 22, 1980 EPA adopted as an interpretive rule a "nationally applicable" regulation (45 Fed. Reg. 36396, May 30, 1980) stating that all recall plans must provide:

> . . . that the manufacturer will remedy, at the manufacturer's expense, all properly maintained and used vehicles which experienced nonconformity during their useful lives regardless of their age at the time of repairs.

As this was considered an interpretive rule, it was not published for notice or comment. GM filed for review of the order in the Court of Appeals for the District of Columbia Circuit. Initially GM prevailed and the order was vacated. EPA petitioned for a rehearing *en banc*. In the rehearing EPA prevailed and this petition for certiorari is from the decision on rehearing.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the District of Columbia Circuit has erroneously misapplied the decision of this Court in the case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 104 S. Ct. 2778 (1984). The deference given to the decision of agencies in the *Chevron* case did not contemplate the interpretive rule which is not required to be open for public notice and comment under the Administrative Procedure Act.

Interpretive rules do not create new liabilities or responsibilities. They are merely interpretations of the statutory mission delegated to an agency by Congress. As such, they should not enjoy the judicial deference given to legislative rules.

Finally, if this decision is allowed to stand, there is great precedential potential for other circuit and district courts. The D.C. Circuit has original jurisdiction in many statutes and will apply this decision to future appeals. Also the court may be viewed as the leading circuit in other potential litigation.

ARGUMENT

THIS DECISION MISINTERPRETS THE HOLDING IN *CHEVRON, U.S.A., INC. v. NATURAL RESOURCES DEFENSE COUNCIL, INC.*

The Court of Appeals for the District of Columbia Circuit has relied heavily on the ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 104 S. Ct. 2778 (1984), in giving exceptional deference to the interpretive rule published by the EPA in May of 1980. We believe that this is a misapplication of the holding by the Supreme Court. In the *Chevron* opinion this Court states that Congress may explicitly direct the administrative agency to pursue a particular action or may implicitly leave the determination to the agency. However, with respect to an implicit delegation, this Court contemplated a regulation with substantive and legislative impact. As such, any regulation would require notice and comment according to the requisites of the APA. This Court held in the *Chevron* case that a court is prohibited from issuing its own construction of a statute when an administrative agency's legislative rule reflects a reasonable interpretation.

> In such a case, a court may not substitute its own construction of statutory provision for a reasonable interpretation made by the administrator of an agency.

—— U.S. at ——, 104 S. Ct. at 2782. It is inconceivable that this decision should be extended to interpretive rules that have not had the benefit of public participation. To allow the extension of judicial deference to such an interpretive rule thwarts the very essence of the APA. It potentially could negate any reasonable challenge of any agency's interpretive ruling with courts applying such an interpretation of *Chevron* to future rules.

The NAM believes that the correct application of the *Chevron* decision would require deference only to sub-

stantive legislative rules that have been published for notice and comment, and would not extend to the interpretive rules of an agency the higher degree of respect that is extended to the legislative rule. To give interpretive rules this deference undermines the very essence of the Administrative Procedure Act that was crafted by Congress in 1946. Rules with substantive impact deserve the participation of affected parties. When an agency endeavors to go beyond the interpretation of statutory mandate via an interpretive rule, the interests of the public are threatened. Judge Bazelon, in a concurring opinion in *Chamber of Commerce v. Occupational Safety and Health Administration*, 636 F.2d 464, 471-72 (D.C. Cir. 1980), who also wrote the reasoned dissent in the instant case, made the following statement regarding the impact of an OSHA effort to achieve legislative regulatory results using an interpretive regulation:

> If left undisturbed by this court, this agency action would wield a significant change in the practices which private employers must follow and in the enforcement steps the agency must take. Under these circumstances, I believe that advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era.

Thus NAM believes that the misinterpretation and application of the *Chevron* decision begs for clarification by this Court.

THE ACTION OF THE EPA IS LEGISLATIVE RATHER THAN INTERPRETIVE

> Divining agency intent is rarely a simple matter, for bureaucratic boilerplate often obscures the true purpose. The administrative agency's own label is indicative but not dispositive; we do not classify a rule as interpretive just because the agency says it is.[1]

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[1] 636 F.2d at 468. See *U.S. Department of Labor v. Kast Metals Corporation* [1984] 12 O.S.H. Cas. (BNA) 1045.

Much of the concern in this case revolves around whether the action by the EPA in May of 1980 was an interpretive rule which does not require notice and comment or whether it constitutes a legislative rule that does require public participation. Many circuits have had to consider this issue, particularly the D.C. Circuit. Again in *Chamber of Commerce* the D.C. Circuit stated:

> A rule is interpretive, rather than legislative, if it is not "issued pursuant to legislatively-delegated power to make rules having the force of law" or if the agency intends the rule to be no more than an expression of its construction of a statute or a rule.

636 F.2d at 468. In this instance, EPA contends that it is merely reciting its interpretation of the pertinent section of the Clean Air Act and has admitted that it is not a rule that relies heavily upon the agency's expertise. In the *Chamber* decision the Court of Appeals for the D.C. Circuit in discussing the intent of interpretive rules, stated that "[s]uch rules only provide a 'clarification of statutory language'" and "the interpreting agency only 'reminds' affected parties of existing duties . . ." 636 F.2d at 469. The EPA interpretive rule is not a mere clarification but in fact imposes new duties. This nationally applicable rule changed a key definition, namely that automobiles must be repaired regardless of their useful life. The majority of the lower court agreed, however, to the EPA's typification of this as interpretive.

The nationally applicable policy that was issued by the EPA in May 1980 does create new responsibilities and is not in keeping with the statutory definition of useful life and the intent of Congress as set forth in the legislative history of the act and the published regulations. This interpretive rule was published six years after regulations promulgated under the Clean Air Act were implemented. It is imperative to consider the circumstances surrounding an interpretive rule to determine how much credence or deference should be accorded the agency.

> However, the degree of respect to be accorded to an agency's statutory interpretation of the limit of its authority varies, depending upon such factors as the interpretation's inherent reasonableness, its consistency with prior precedent, its basis in statutory text and legislative history, and whether it is based on experience or expertise peculiarily within the agency's ken.

Office of Consumers' Council v. Federal Energy Regulatory Commission, 655 F.2d 1132, 1141 (D.C. Cir. 1980).

NAM contends that this EPA policy extends beyond the purview of an interpretive rule and has the attributes of a legislative rule which should have required the agency to provide an opportunity for notice and comment by affected parties.

THIS CASE HAS THE POTENTIAL FOR CONSIDERABLE PRECEDENTIAL EFFECT

Enclosed in this brief is Appendix A which is a compilation of all the statutes over which the U.S. Circuit Court of Appeals for the District of Columbia exercises exclusive jurisdiction. There are 19 statutes that are reviewable only in the D.C. Circuit. This decision does have the potential for great impact on all future decisions involving these specific statutes. Additionally, other circuits, in the wake of this opinion, may well view the Court of Appeals for the D.C. Circuit as the definitive circuit for resolution of issues involving legislative and interpretive rules and follow this Circuit's application of the decision in the *Chevron* case.

Another concern is that this opinion in the D.C. Circuit will encourage other agencies that are reviewable by the D.C. Circuit to circumvent the lengthier legislative rule process and achieve like results by the issuance of an interpretive rule that supposedly only clarifies the agency's statutory interpretation. Additionally, many of the stat-

utes, mandated exclusive jurisdiction in the District of Columbia Circuit, are administered by the respondent, the Environmental Protection Agency. This offers greater impetus to the EPA to continue the use of nationally applicable interpretive rules in areas that have a substantial impact that should merit the scrutiny attendant to the legislative regulation process. The NAM believes that the far reaching effects of this decision in the Court of Appeals for the D.C. Circuit as well as the other federal district and circuit courts demands consideration of this issue by this Court.

CONCLUSION

Based upon the significant issues raised by the D.C. Circuit's interpretation of the decision in the *Chevron* case and the distinctions to be drawn between legislative and interpretive rules, this case warrants review by this Court. As stated above, the NAM believes that the U.S. Court of Appeals for the D.C. Circuit has erroneously applied this Court's decision in the *Chevron* case. Further, we believe that the EPA's nationally applicable regulation is tantamount to a legislative rule that should require notice and comment pursuant to the APA. Finally, because there are numerous statutes over which this Circuit has exclusive jurisdiction, all aspects of this case require careful consideration due to the potential precedential effect it will have in future appeals. The majority opinion in the lower court argues that the public is benefited by the resolution of this case in the EPA's favor and is in keeping with the public policy goals expressed in the Clean Air Act. It is equally as important to the public interest that the requisites of the Administrative Procedure Act be assiduously followed as this affects not only an entity such as the Petitioner but any party that is affected by a Congressionally mandated statute and the regulations issued thereunder. It is only when the agency is truly engaging in interpreting the statute and

is not creating new responsibilities or liabilities that the rule should not require public participation.

A linchpin of our democratic process is that any affected party be allowed to have its voice heard when an agency action has the effect of statutory law and creates new liabilities and responsibilities. Thus, it is essential that the requisites of the Administrative Procedure Act be accorded the respect that Congress intended when the statute was enacted and as it has been interpreted in the ensuing decades.

We respectfully request this Court to grant the petition for a writ of certiorari to review the decision below of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY PROVISIONS UNDER WHICH THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT EXERCISES EXCLUSIVE JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit possesses exclusive jurisdiction to review agency action taken under the following major legislation, pursuant to the specified statutory provisions:

1. Government in the Sunshine Act, 5 U.S.C. § 552b(g).

   Review of agency regulations issued pursuant to this subsection for compliance with the open-meeting requirements of § 552b(b)-(f) and proceedings to require the promulgation of conforming regulations.

2. Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. § 719h(c).

   The United States Court of Appeals for the District of Columbia Circuit, acting as a Special Court, has exclusive jurisdiction over claims alleging that this chapter is invalid or that an action will deny rights under the Constitution or that an action is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

3. Federal Energy Administration Act of 1974, 15 U.S.C. § 766(c).

   Challenges to administrative rulemaking of general and national applicability done pursuant to this chapter, unless done pursuant to the Emergency Petroleum Allocation Act of 1973.

4. Automobile Fuel Efficiency Act of 1980, 15 U.S.C. § 2003(b)(3)(E).

   Review of any action by the Secretary of Transportation denying or granting an exemption from the provisions of 15 U.S.C. § 2003(b)(1), which requires separate calculation of fuel economy for automobiles domestically manufactured and automobiles not domestically manufactured.

5. International Claims Settlement Act of 1949, 22 U.S.C. § 1631f(b).

   Claims for the return of Bulgarian, Hungarian, or Rumanian property or proceeds vested in the President's designee that have been denied in whole or in part by that designee.

6. Foreign Service Act of 1980, 22 U.S.C. § 4109(a).

   Action for judicial review of final orders of the Foreign Service Labor Relations Board, except as provided in 22 U.S.C. § 4114(d) (resolution of implementation disputes).

   22 U.S.C. § 4109(b).

   Petitions of the Foreign Service Labor Relations Board for enforcement of orders.

7. Internal Revenue Code of 1954 (as amended), 26 U.S.C. § 7482(b)(1).

   Decisions of the Tax Court not covered by 26 U.S.C. § 7482(b)(1)(A), (B), (C), (D), or (E) describing venue in the courts of appeals may be reviewed by the Court of Appeals for the District of Columbia Circuit.

   26 U.S.C. § 7482(b)(3).

   Decisions of the Tax Court under 26 U.S.C. § 7478 (declaratory judgments relating to status

of certain governmental obligations) may be reviewed only in the United States Court of Appeals for the District of Columbia Circuit.

8. Federal Election Campaign Act Amendments of 1979, 26 U.S.C. § 9011(a).

   Review of any certification, determination, or other action of the Federal Election Commission pursuant to the chapter governing the Presidential Election Campaign Fund.

   26 U.S.C. § 9041(a).

   Review of any action by the Federal Election Commission under the chapter governing the Presidential Primary Matching Payment Account.

9. Federal Mine Safety & Health Act of 1974, 30 U.S.C. § 953(d).

   Any state aggrieved by a decision of the Secretary regarding federal assistance to the states, may file in the United States Court of Appeals for the District of Columbia Circuit to modify or set aside that decision.

10. Safe Drinking Water Act, 42 U.S.C. § 300j-7(a)(1).

    Review of actions of the Environmental Protection Agency in promulgating any national primary drinking water regulation under 42 U.S.C. § 300g-1 (national drinking water regulations), any regulation under 42 U.S.C. § 300g-2(b)(1) (state primary enforcement responsibility; regulations; notice and hearing; publication in Federal Register; applications), any regulation under 42 U.S.C. § 300g-3(c) (notice of owner or operator of public water system to persons served), any regulation for state underground injection control programs

under 42 U.S.C. § 300h, or any general regulation for the administration of this subchapter.

11. Noise Control Act of 1972, 42 U.S.C. § 4915(a).

Any petition for review of an action of the Enviromental Protection Agency in promulgating any standard or regulation under 42 U.S.C. § 4905 (noise emission standards for products distributed in commerce), or 42 U.S.C. § 4916 (railroad noise emission standards), or 42 U.S.C. § 4917 (motor carrier noise emission standards) or any labeling regulation under 42 U.S.C. § 4907 and any petition for review of an action the Federal Aviation Administration in promulgating any standard or regulation under 49 U.S.C. App. § 1431 (control and abatement of aircraft noise and sonic boom).

12. Energy Policy and Conservation Act, 42 U.S.C. § 6384(b).

Actions to enjoin or set aside an order issued under 42 U.S.C. § 6382(a)(1)(B), which authorizes the Comptroller General, by general or special orders, to require any person to submit written answers to interrogatories, or to submit information (books, records or any other information) for the purpose of verifying records of any vertically integrated petroleum company's financial information related to certain activities under 42 U.S.C. § 1381(a)(3) or of any person required to submit energy information to federal agencies under 42 U.S.C. § 6381(a)(1)(B).

13. Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6976(a)(1).

Review of actions of the Environmental Protection Agency in promulgating any regulation or requirement under this Act, which includes principal provisions for the regulation of hazardous wastes.

14. Clean Air Act Amendments of 1970, 42 U.S.C. § 7607(b)(1).

Review of actions by the Environmental Protection Agency in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under 42 U.S.C. § 7412 (hazardous air pollutants), any standard of performance or requirement under 42 U.S.C. § 7411 (new stationary sources), any standard under 42 U.S.C. § 7521 (motor vehicle emission and fuel standards) (other than other promulgated under 42 U.S.C. § 7521(b)(1)), any determination under 42 U.S.C. § 7521(b)(5) (waiver for 1981 and 1982 model years of carbon monoxide emission standard for light-duty motor vehicles and engines), any control or prohibition under 42 U.S.C. § 7545 (regulation of fuels), any standard under 42 U.S.C. § 7571 (aircraft emission standards), any rule issued under 42 U.S.C. § 7413 (federal enforcement procedures), 42 U.S.C. § 7419 (primary nonferrous smelter orders), or 42 U.S.C. § 7420 (noncompliance penalty), or any other nationally applicable regulation promulgated, or final action taken, by EPA under this Act.

Additionally, review of actions by EPA under other specifically listed sections, if the Administrator finds and publishes notice that those actions are of nationwide scope or effect.

15. Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9125.

Review of decisions by the National Oceanic and Atmospheric Administration to issue, transfer, modify, renew, suspend, or terminate a license for an ocean thermal energy conversion facility.

16. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund"), 42 U.S.C. § 9613(a).

    Review of any regulation promulgated by the Environmental Protection Agency under this Act, which contains principal regulatory provisions for the cleanup of hazardous waste sites.

17. Outer Continental Shelf Leasing Program, 43 U.S.C. § 1349(c)(1).

    Review of any action of the Secretary of the Interior to approve a leasing program pursuant to 43 U.S.C. § 1344.

18. Merchant Marine Act of 1936, 46 U.S.C. § 1181(b).

    Denials by the Secretary of Transportation of contractor's applications to transfer vessels which are subject to operating-differential subsidy contracts to foreign registry upon default or cancellation by the United States.

19. Communications Act of 1934, 47 U.S.C. § 402(b).

    Appeals of decisions and orders of the FCC in eight categories, including: by any applicant for a construction permit or station license, or for the renewal of modification of any such license, whose application is denied by the Commission; by any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission; by the holder of any construction permit or station license which has been modified or revoked by the Commission; by any person upon whom an order to cease and desist has been served under section 312 of this title; by any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1098

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. The Chamber's current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and local and state chambers of commerce.

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[1] This brief *amicus curiae* is filed with the written consent of the parties to this action pursuant to Supreme Court Rule 36.1. Statements of consent are on file with the Clerk of this Court.

The Chamber regularly advocates its members' views in court [2] and before administrative agencies on issues of national concern to the American business community. This representation constitutes a significant aspect of the Chamber's activities, and includes participation in agency rulemakings on a broad spectrum of business issues. The Chamber has submitted public comments to, *inter alia*, the Environmental Protection Agency, the Occupational Safety and Health Administration, the Internal Revenue Service, and the Department of Energy.[3] The Chamber believes that its comments play an important role in educating these agencies about the impact of a proposed rule on the business community. Unfortunately, the Chamber has been foreclosed in some instances from this participation when agencies characterize rules as "interpretative," and like the petitioner here, has initiated litigation contesting administrative action that was taken without the benefit of public notice and comment. *Chamber of Commerce of the United States* v. *OSHA*, 636 F.2d 464 (D.C. Cir. 1980).

This case presents this Court with two critical questions of administrative law that have far-reaching consequences for the entire regulated community. The label assigned to an administrative rule determines *whether* it

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[2] *See, e.g., Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, Nos. 83-1013, 83-1373, slip op. (U.S. Feb. 27, 1985); *Trans World Airlines* v. *Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985); *Natural Resources Defense Council, Inc.* v. *EPA*, 595 F. Supp. 65 (D.D.C. 1984), *appeal docketed*, Nos. 84-5566-69 (D.C. Cir. 1984).

[3] *See, e.g.*, Comments of the Chamber of Commerce of the United States on *Proposed Regulations Relating to the Limitation on the Amount of Depreciation and Investment Tax Credit for Automobiles and the Limitation when Certain Property is Used for Personal Purposes* (December 21, 1984); *Advance Notice of Proposed Rulemaking*, 40 C.F.R. 765, *Formaldehyde: Determination of Significant Risk* (July 23, 1984).

will be reviewed by the public and *how* it will be reviewed by the courts. Only "interpretative" rules are exempt from the public notice and comment requirements of the Administrative Procedure Act. Only "legislative" rules require the highly deferential standard of judicial review mandated by this Court in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984).

In the decision below, the U.S. Court of Appeals for the District of Columbia Circuit upheld as "interpretative" an EPA rule that extended motor vehicle recall and repair liability under the Clean Air Act. In so doing, the court failed to apply the "substantial impact" test followed in four circuits for distinguishing between legislative and interpretative rules, and applied *Chevron's* highly deferential standard of judicial review.

The Chamber is concerned that this decision will adversely affect its ability to represent its members in future rulemakings. By ignoring the impact of a rule, the District of Columbia Circuit encourages administrative agencies to by-pass public review, and thereby avoid the kind of participation Congress intended to precede policy determinations that have a substantial impact on the rights and liabilities of the regulated community. The number of regulatory statutes with exclusive review in the District of Columbia Circuit underscores the importance of this issue.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of the regulated community in this case. Without guidance from this Court on how to distinguish between legislative and interpretative rules, the regulated community runs the continued risk of being denied the opportunity to participate in agency decisionmaking because of wrongly assigned "interpretative" labels upheld under improper standards of judicial review.

Immediate review by this Court is required to resolve the conflict in the circuits, and to instruct the lower courts on the proper interpretation of *Chevron*. For these reasons, the Chamber respectfully submits its brief, and urges this Court to grant General Motors' Petition.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the District of Columbia Circuit upheld as "interpretative" an Environmental Protection Agency ("EPA") rule that extended General Motors' recall repair liability under the Clean Air Act beyond the statutory definition of a motor vehicle's useful life. The effect of the rule was to increase fourfold the number of vehicles to be repaired at the company's expense under threat of fines up to $10,000 per vehicle. By characterizing this rule as "interpretative," EPA foreclosed any public participation in the agency decision-making process, even though the rule critically affected the rights and liabilities of the entire motor vehicle industry.

This decision adds to the confusion among the courts of appeals on how to distinguish between legislative and interpretative rules. By rejecting the "substantial impact" test followed by the First, Second, Fifth and Eighth Circuits, the District of Columbia Circuit encourages regulatory agencies to engage in closed-door decision-making without regard to the effect of their actions on the regulated community.

This decision also misapplies the highly deferential standard of judicial review reserved for "legislative" rules by this Court in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). The District of Columbia Circuit erred both in upholding EPA's "interpretative" label and in applying *Chevron's* lenient standard to a rule adopted without the benefit of public notice and comment.

This Court's guidance is needed to resolve the conflict in the circuits, establish a uniform test for distinguishing between legislative and interpretative rules, and instruct the lower courts on the proper interpretation of *Chevron*.

ARGUMENT

The characterization of a rule as "interpretative" or "legislative" has far-reaching implications for the regulated community. It determines whether affected parties may participate in agency decisions that have a substantial impact on their rights and liabilities. It also determines the amount of deference a court must give the rule once promulgated.

This distinction, fundamental to administrative law, is founded on the premise that only legislative rules are promulgated pursuant to a congressional delegation of authority. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-302 (1979). In contrast, interpretative rules serve only to advise the public of agency policy on how it construes a statute or regulation. Hence, legislative rules are subject to the public notice and comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 (b), and bind the rights and obligations of the affected parties. Interpretative rules, on the other hand, are exempt from these procedural safeguards, 5 U.S.C. § 553 (b) (A), and have no legal force or effect.

Despite the serious consequences attached to the "interpretative" and "legislative" labels, nowhere in the APA are they defined. Lower courts attempting to define those terms and make the distinction have adopted a range of conflicting tests. As a result, efforts to determine whether a particular rule falls within the APA's interpretative rule exemption have left the lower courts "wandering lost in the Serbonian Bog." [4] Courts and commentators

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[4] *Jean* v. *Nelson*, 711 F.2d 1455, 1480 (11th Cir. 1983), *mooted prior to rehearing en banc*, 727 F.2d 957 (11th Cir. 1984).

have described this area as "enshrouded in considerable smog," [5] "not black and white," [6] "a morass," [7] "confusing," [8] and "difficult." [9]

Notwithstanding the confusion and conflicts among the lower courts, this Court has never articulated a test for determining whether a rule is interpretative or legislative. In fact, in *Chrysler*, this Court noted this absence, and stated that "authoritative sources essentially offer definitions [of the APA's interpretative rule exemption] by negative inference." 441 U.S. at 302. The lower courts bear this out by continuing to develop conflicting tests for characterizing administrative actions.

I. THIS COURT SHOULD ESTABLISH A UNIFORM TEST FOR DISTINGUISHING BETWEEN INTERPRETATIVE AND LEGISLATIVE RULES.

A. Conflicting Standards Divide the Circuits on the Characterization of Agency Rules.

Multiple tests for distinguishing between legislative and interpretative rules have emerged within the circuits. They focus in varying degrees on a number of different factors. These factors include "substantial impact," "binding norm," "intent of the agency" and whether the agency has made a "significant policy determination" in promulgating a rule. Immediate review by this Court is required to resolve these inconsistencies and

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[5] *Noel* v. *Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1975).

[6] *United States Department of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1152 (5th Cir. 1984).

[7] *Jean* v. *Nelson*, 711 F.2d at 1480.

[8] 2 K. Davis, Administrative Law Treatise § 7.5 at p. 32 (2nd Ed. 1979).

[9] *Guardian Federal Savings and Loan Ass'n* v. *Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 665 (D.C. Cir. 1978).

establish a uniform test to ensure consistent compliance with the public notice and comment requirements of the APA.

1. *Substantial Impact*

The primary conflict in the circuits focuses on the extent to which the impact of a regulation is relevant to determining its character. The District of Columbia Circuit, joined by the Ninth and Eleventh Circuits, hold that the impact of a rule upon the affected parties is not a factor.[10] These circuits reject this test based on their interpretation of this Court's opinion in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).[11]

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[10] *American Postal Workers Union* v. *U.S. Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984) ("our decision that . . . [the rule] was a legislative rule was based not on the rule's impact but rather on the fact that it was promulgated pursuant to a specific delegation of legislative power in the governing statute"); *Rivera* v. *Becerra*, 714 F.2d 887, 891 (9th Cir. 1983), *cert. denied sub nom. International Union, United Auto., Aerospace and Agricultural Implement Workers* v. *Donovan*, 104 S. Ct. 1591 (1984) (rejecting the substantial impact test); *Jean* v. *Nelson*, 711 F.2d at 1480 ("We here conclude that the substantial impact test is insufficient to determine whether a rule is a general statement of policy").

[11] *Vermont Yankee* held that the APA established the maximum procedural requirements which Congress was willing to have the courts impose upon agency rulemakings. *Id.* at 524. Both the District of Columbia and Ninth Circuits hold that the language of *Vermont Yankee* proscribes courts from considering the substantial impact of a regulation, because such thoughts engraft judicial notions of proper procedures upon agencies beyond the requirements of the APA. *Cabais* v. *Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982); *Rivera* v. *Becerra*, 714 F.2d at 890-91. In contrast, the Fifth Circuit interprets *Vermont Yankee* to apply to the court's role once it has determined that a rule is legislative and thus subject to notice and comment procedures, and not to whether the APA mandates use of the statutory notice and comment procedures in the first place. *U.S. Department of Labor* v. *Kast Metals Corp.*, 744 F.2d at 1154 n.19.

Four other circuits do consider the impact of a regulation in determining its character. However, the weight they accord to it varies. The Second, Fifth and Eighth Circuits prescribe that when a proposed rule has a substantial impact, the parties affected are automatically entitled to notice and opportunity to comment.[12] The substantial impact test is the primary means by which these courts look beyond the agency's label to determine whether a rule is the type Congress thought appropriate for public participation. By contrast, the First Circuit holds that the fact that a rule has a substantial impact does not necessarily make the rule legislative, but is only one factor in determining whether notice and comment is required. *Levesque* v. *Block*, 723 F.2d 175, 182 (1st Cir. 1983).

2. *Binding Norm*

A second conflict has developed over the role of a rule's effect in determining its character. Frequently referred to as the "binding norm" test, the central inquiry is whether the rule binds the rights and obligations of the regulated parties. If the rule has no legal effect and imposes no new duties, it is interpretative. *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979).

The District of Columbia and the Fourth Circuit follow this approach. *City of Alexandria* v. *Helms*, 728 F.2d 643, 647 (4th Cir. 1984); *Citizens to Save Spencer*

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[12] *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 702 (5th Cir. 1979) ("Our inquiry, therefore, is not whether the rule is 'substantive' or 'procedural,' but rather whether the rule will have a 'substantial impact' on those regulated."); *American Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, 509 F.2d 29, 33 (8th Cir. 1974) ("To determine whether the amendment was substantive or interpretative, we must focus upon its impact on the banking industry regulated by the Board."); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) ("By virtue of this substantial impact . . . , notice and opportunity for comment by the public should first be provided.").

County v. *EPA*, 600 F.2d at 876. Two other circuits reject it. According to the First Circuit, the binding norm test is unhelpful because *all* rules are binding on the regulated parties. *Levesque* v. *Block*, 723 F.2d at 182. The Ninth Circuit states that the extent to which regulations are binding is only an effect of the distinction between legislative and interpretative rules, not a criterion of distinction. *Alcaraz* v. *Block*, 746 F.2d 593, 614 (9th Cir. 1984).

3. *Agency Intent*

The District of Columbia Circuit, along with the First, Ninth and Eleventh Circuits, focus on the intent of the agency in promulgating a rule.[13] These courts hold that where an agency has the power to promulgate both legislative and interpretative rules, the intent of the agency to promulgate one type of rule over the other determines in part its character.

4. *Significant Policy Determination*

Another factor considered by at least one circuit is whether the rule involves a significant policy determination. *First Bancorporation* v. *Board of Governors*, 728 F.2d 434 (10th Cir. 1984). Where an agency makes a significant policy determination, the resulting rule is legislative. *Id.* at 438.

B. A Uniform Standard Will Eliminate the Conflict in the Circuits and Ensure Compliance with the Notice and Comment Requirements.

Congress recognized that an agency's knowledge is rarely complete, and enacted the APA's notice and comment requirements to ensure that agencies are provided

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[13] *Levesque* v. *Block*, 723 F.2d at 182; *American Postal Workers Union* v. *U.S. Postal Service*, 707 F.2d at 558; *Louisiana-Pacific Corp.* v. *Block*, 694 F.2d 1205, 1209-10 (9th Cir. 1982); *American Trucking Ass'n* v. *United States*, 688 F.2d 1337, 1344 (11th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 2458 (1984); *Chamber of Commerce of the United States* v. *OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980).

with relevant facts and information before they implement rules of general applicability. S. Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946). The lack of specific language in the APA regarding which rules are subject to these requirements has given rise to a body of case law articulating different criteria for characterizing agency actions. These criteria have been inconsistently applied, creating great conflict in the decisions of the circuits. Moreover, agency actions have been allowed to proceed without the public input contemplated by the APA. A single standard enunciated by this Court is needed to eliminate this confusion, and ensure that the procedures mandated by Congress are followed.

II. THE LOWER COURT ERRONEOUSLY CHARACTERIZED THIS RULE, AND THEN MISTAKENLY ACCORDED IT TOO MUCH DEFERENCE.

A. The Court Below Wrongly Characterized This Rule as Interpretative.

Without notice and comment, EPA adopted a "nationally applicable regulation" [14] which extended recall and repair liability under the Clean Air Act beyond the statutory definition of a motor vehicle's useful life. EPA's action increased by fourfold the number of vehicles to be repaired at General Motors' expense under threat of fines of up to $10,000 per vehicle. EPA characterized this rule as "interpretative," and thereby foreclosed any public participation in its decisionmaking process, even though the rule critically affected the rights and liabilities of the entire motor vehicle industry. This characterization was clearly erroneous.

EPA's recall and repair rule reflected significant policy determinations that Congress left for the agency to make, and created a substantial impact on the motor vehicle industry, imposing new rights and duties. The

[14] 45 Fed. Reg. 36,396 (1980).

lower court failed to give adequate weight to these factors, but concentrated instead on the agency's label and justification for the rule. Accordingly, the court erred in upholding EPA's characterization.

This rule reflected important policy determinations made by the agency on the question of whether a vehicle subject to recall notification must be repaired if it has passed its useful life. The Clean Air Act is silent on this issue, and as EPA stated, "[t]he legislative history of the Act offers little guidance." 45 Fed. Reg. 36,397 (1980). Thus, the rule was neither a restatement nor an explanation of Congress' intent.[15] With no actual congressional intent to draw on, the agency made policy-based determinations within gaps in the statute left by Congress. By choosing among alternative enforcement programs, EPA exercised legislative rulemaking authority. *See, Chevron,* 104 S. Ct. at 2782-83; *Chrysler Corp.* v. *Brown,* 441 U.S. at 316.

As noted by the petitioner, EPA's initial regulations implementing the recall and repair provisions were adopted by legislative rulemaking in 1974 after extensive public comment on their impact. Pet. at 20. The instant rule should have undergone the same public scrutiny and input, and the lower court should have accorded more weight to the fact that this rule embodied significant policy choices.

The lower court also failed to take into account the rule's substantial impact on the regulated community, an important factor in distinguishing between legislative and interpretative rules.[16] Rules of general applicability

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[15] This was an area, like that in *Chevron,* in which Congress "did not actually have an intent." 104 S. Ct. at 2783.

[16] *See, Chrysler Corp.* v. *Brown,* 441 U.S. at 302 (effect on individual rights is "an important touchstone" for distinguishing legislative rules); *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974) (describing a legislative rule as one "affecting individual rights and obligations").

which have a substantial impact on the regulated industry can only be promulgated after notice and opportunity for comment.[17]

The rule involved in this case will have a formidable effect on the obligations of manufacturers. The number of vehicles eligible for repair in each recall will increase substantially. Manufacturers may even be required to repair vehicles that conformed with all requirements throughout their useful lives, under threat of fines of up to $10,000 per vehicle. This burden will be particularly onerous in the event of recalls issued late in the life of a class. The impact of such a rule should be considered before the label "interpretative" is allowed to stand.

In holding that the agency's rule was interpretative, the lower court relied on its assertion that EPA's "*justification* for the rule is comprised of reasoned statutory interpretation, with reference to the language, purpose and legislative history of section 207(c)." Pet. App. at A-8 (emphasis added). Given the agency's description of the legislative history and its reliance on major policy determinations, this characterization of the agency's justification is highly suspect. In any event, agency justification for promulgating a rule should not be determinative of the nature of the rule produced.

The lower court also placed too much reliance on the label the agency attached to the rule. While this is a factor to be considered, an agency's own label is not dispositive. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942). Rather, "it is the substance of what the [agency] has purported to do and

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[17] *Pharmaceutical Manufacturers Ass'n* v. *Finch*, 307 F. Supp. 858, 863 (D. Del. 1970). *Accord, Daniel Freeman Memorial Hospital* v. *Schweiker*, 656 F.2d 473, 476-77 (9th Cir. 1981); *Anderson* v. *Butz*, 550 F.2d 459, 463 (9th Cir. 1977); *Pickus* v. *U.S. Board of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d at 482; *Texaco, Inc.* v. *FPC*, 412 F.2d 740, 744 (3d Cir. 1969).

has done which is decisive." *Id.* The lower court recited this principle, but went on to accord undue weight to the agency's label. *See*, Pet. App. at A-7, A-8. By promulgating this rule, EPA exercised legislative power, and was required to undergo the appropriate procedural prerequisites.

B. The Court Below Wrongly Applied *Chevron's* Highly Deferential Standard of Review to a Rule it Characterized as Interpretative.

The lower court relied on this Court's decision in *Chevron*, 104 S.Ct. 2778, for the standard of judicial review it applied to this administrative rule. This reliance was misplaced, and resulted in the lower court applying the highly deferential standard of review reserved for legislative rules to a rule it characterized as interpretative. This Court's guidance is needed to prevent further misconstruction and misapplication of the principles announced in *Chevron.*

Over the past two decades, the standard of review applied by this Court when examining administrative rules has varied substantially, depending upon the nature of the rule, its statutory basis, and its administrative history. Among other standards, this Court has accorded "substantial deference," [18] "due deference,[19] and "some deference," [20] to agency interpretations.

By comparison, this Court has repeatedly stated that a highly deferential standard of review is to be applied

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[18] *Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 2979, 2992 (1984).

[19] *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 n.13 (1981).

[20] *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979).

to "legislative" agency rules.[21] Just this Term, the Court applied this standard in *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, Nos. 83-1013 and 83-1373, slip op. (U.S. Feb. 27, 1985), when reviewing an EPA variance procedure promulgated pursuant to the public notice and comment requirements of the APA.

In *Chevron*, the Court once again set forth this highly deferential standard, stating that "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 104 S. Ct. at 2782.[22] They are upheld if they reflect "a reasonable choice within a gap left open by Congress." *Id.* at 2793.

Legislative rules are given such great deference because Congress delegated to the agency the task of accommodating conflicting policies and prescribing regulations that have the force of law. *Chevron*, 104 S. Ct. at 2783. Moreover, they are adopted after public participation through notice and comment.[23] Interpretative rules,

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[21] *See, e.g., United States* v. *Morton*, 104 S. Ct. 2769, 2776 (1984) (controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-54 (1982) (subject to judicial review only to determine whether the administrator has exceeded his statutory authority or acted arbitrarily); *Herweg* v. *Ray*, 455 U.S. 265, 274 (1982) (entitled to more than mere deference or weight).

[22] This is akin to the standard enunciated in the Administrative Procedure Act for rules promulgated after notice and comment procedures. 5 U.S.C. § 706(2)(A).

[23] The importance of public input into the administrative process was recognized early on. *See*, S. Doc. 248 at 20 (Congress recognized that an agency's "knowledge is rarely complete, and it must learn the . . . viewpoints of those whom the regulation will affect . . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves . . .").

adopted without this basis or input, are given less deference, and are subject to rigorous judicial scrutiny.[24]

EPA characterized the recall and repair rule as interpretative, EPA Brief at 41, and the Circuit Court agreed. Opinion and Order of D.C. Circuit En Banc dated September 7, 1984, Pet. App. at A-8. But despite its determination that the rule was interpretative, the court erroneously applied the lenient standard of review *Chevron* mandated for legislative rules. While holding that the rule was akin to a simple agency statement of what the statute means, the court went on to exercise "special deference" in light of its assessment that Congress had delegated to the agency "discretion in administering and designing an enforcement scheme." Pet. App. at A-23 n.16. This was plain error.

A rule cannot be characterized as interpretative, thus exempt from notice and comment requirements, and yet reviewed under the lenient standard reserved for legislative rules. Such characterization and subsequent lack of judicial review permits unconstrained agency action in areas of great public concern without public input. The Chamber and others who choose to comment on proposed agency actions should not be foreclosed from such opportunity without meaningful recourse.

The circuit courts have cited *Chevron* in support of a variety of standards and principles. While it is agreed that *Chevron* applies to legislative rules, it has been held both applicable [25] and inapplicable [26] to interpretative rules.

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[24] *See Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977) ("Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute . . . Such rules have the force and effect of law.' . . . By way of contrast, a court is not required to give effect to an interpretative regulation.") (citations omitted); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-42 (1976); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

[25] *Alcaraz* v. *Block*, 746 F.2d at 606.

[26] *Capitano* v. *Secretary of Health and Human Services*, 732 F.2d 1066, 1076 (2d Cir. 1984).

Chevron also has been cited, *inter alia*, for the proposition that reviewing courts must give "broad deference" to agencies' application of statutory criteria,[27] that reviewing courts are limited to "the narrow inquiry of whether [the] regulations are a 'reasonable' interpretation or explanation of the statute," [28] that reviewing courts are required to determine whether the agency considered the matter in a detailed and reasoned fashion,[29] and that reviewing courts are forbidden to "simply defer" to an agency's view of the law.[30]

Moreover, while it applied *Chevron* to this interpretative rule, the District of Columbia Circuit has varied in the amount of deference it has accorded other administrative actions, and the reasons for such deference.[31] The decision below adds further confusion to the issue. This is particularly troublesome in view of the number of

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[27] *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984).

[28] *Cospito* v. *Heckler*, 742 F.2d 72, 85 n.21 (3d Cir. 1984).

[29] *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984).

[30] *New England Telephone & Telegraph Co.* v. *Public Utilities Commission of Maine*, 742 F.2d 1, 11 (1st Cir. 1984).

[31] *See, e.g., State of Montana* v. *Clark*, No. 83-1982, slip op. at 13 (D.C. Cir. Nov. 20, 1984); *EEOC* v. *Federal Labor Relations Authority*, 744 F.2d 842, 847 (D.C. Cir. 1984) (according "considerable deference" to agency interpretation); *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 60 (D.C. Cir. 1983) (according "some deference" to the agency interpretation); *Planned Parenthood Federation of America* v. *Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983) ("the deference accorded does vary from case to case, and under certain circumstances can dissipate altogether"); *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1422-23 (D.C. Cir. 1983) (courts accord "only limited deference" to an agency's interpretation of its own governing statute); *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982) (according "great deference" to the agency interpretation).

statutes providing for exclusive review in the District of Columbia Circuit. The Chamber asks this Court to address this issue and clarify that the highly deferential standard of review it articulated in *Chevron* applies only to legislative rules, and that interpretative rules are to be accorded more rigorous judicial scrutiny.

CONCLUSION

For the reasons stated above, the Chamber respectfully urges this Court to grant the General Motors' Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

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April 9, 1985

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BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

On behalf of certain of its member companies, the Motor Vehicle Manufacturers Association ("MVMA") submits this brief amicus curiae in support of General Motors Corporation's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.[1] That decision is reprinted in the appendices to the petition and is reported at 742 F.2d 1561.

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[1] By letters filed with the Clerk of the Court, both General Motors Corporation ("GM") and the Administrator of the Environmental Protection Agency ("EPA") consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

MVMA is an incorporated, not-for-profit trade association of major automobile and truck manufacturers.[2] Its members have a substantial interest in this Court's review of the decision below because (1) the EPA rule at issue dramatically increases their recall and repair obligations, (2) the procedures used by the agency and the reviewing court denied MVMA members an adequate opportunity to challenge the rule, which threatens to bind them forever, and (3) MVMA member companies, regulated under many health and safety laws administered by federal agencies,[3] have a broad interest in the administrative law questions presented by the petition.

STATEMENT

The issues in this case arise out of a dispute between GM and the EPA over the proper scope of a recall of certain 1975 Cadillacs. Under section 207(c)(1) of the Clean Air Act, EPA has authority to order the recall and repair, at the manufacturer's expense, of vehicles failing to conform to prescribed emissions standards during their "useful life."[4] GM contended that this authority did not

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[2] MVMA files this brief on behalf of its following members: AM General Corporation, American Motors Corporation, Chrysler Corporation, Ford Motor Company, International Harvester Company, M.A.N. Truck and Bus Corporation, PACCAR Inc., Volkswagen of America, Inc., and Volvo North America Corporation. The petitioner General Motors Corporation is also a member of MVMA.

[3] *See, e.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (concerning passive restraint regulations issued under the National Traffic and Motor Vehicle Safety Act); *Chrysler Corp. v. EPA*, 600 F.2d 904 (D.C. Cir. 1979) (concerning noise regulations issued under the Noise Control Act).

[4] 42 U.S.C. § 7541(c)(1) (1982). Section 202(d) of the Clean Air Act, *id.* § 7521(d), sets forth guidelines for determining the useful life of various types of vehicles and is incorporated by reference in section 207(c)(1).

permit EPA to order the recall and repair of cars that exceeded the age or mileage defining their "useful life."

To the industry's surprise, EPA enforced its contrary view on May 30, 1980, by issuing what it called an interpretative rule. The rule provided that, when a recall is ordered, the manufacturer must repair at its expense "all properly maintained and used vehicles which experienced the nonconformity during their useful lives *regardless of their age or mileage at the time of repair.*" [5] EPA declared the rule to be "a final rule effective upon publication" without any prior notice of the rulemaking and without any opportunity for comments from the public.[6] EPA also pronounced the rule "a 'nationally applicable regulation' under section 307(b)(1) of the Clean Air Act," [7] thus specifically invoking the preclusive review provision of the statute, which forbids any challenge to such EPA action other than by appeal to the District of Columbia Circuit within sixty days.[8] The agency immediately applied the May 30 rule to the recall of GM's 1975 Cadillacs.

On appeal by GM, the United States Court of Appeals for the District of Columbia Circuit reviewed EPA's rule under the highly deferential standard set out in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 104 S. Ct. 2778 (1984). Under *Chevron*, appellate inquiry is limited to whether an agency's construction of a statute is "sufficiently reasonable" to be accepted.[9] Applying that test, the court below sustained the May 30 rule. It erroneously failed to exercise its own independent judgment on the merits of the rule as an interpretation of the Clean Air Act and

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[5] 40 C.F.R. § 85.1803 App. A (emphasis added).

[6] 45 Fed. Reg. 36396, 36398 (1980).

[7] *Id.*

[8] *See* 42 U.S.C. § 7607(b) (1982); Part I *infra*.

[9] *See* 742 F.2d at 1567 (citations omitted).

on the adequacy of the procedures used by EPA during the rulemaking process.

REASONS FOR GRANTING THE WRIT

The Court should review the decision below for two reasons. First, parties affected by the May 30 rule have been deprived of procedural rights protected by the Fifth Amendment to the Constitution. EPA substantially extended the recall obligations of vehicle manufacturers with a final regulation protected by the preclusive review provision of the Clean Air Act, even though the agency had provided no prior notice of the rulemaking and no opportunity to comment on the rule. The lower court then denied the manufacturers an effective opportunity to participate during appellate review by testing the May 30 rule against a deferential standard that imposed no meaningful check on the substantive or procedural decisions made by the agency. As Part I of this brief shows, MVMA's position is that this Court's review is necessary because the Constitution does not permit a combination of agency and judicial action that produces an onerous, binding regulation through a process that so totally excludes affected members of the public.

As we show in Parts II and III of this brief, the constitutional defect resulted from two errors of statutory interpretation. One was the decision of the appellate court to ignore the requirements of the Administrative Procedure Act ("APA") and use the deferential *Chevron* standard to review an interpretative rule issued without prior notice or comment. The other was the EPA's violation of both the APA and the Clean Air Act in failing to follow notice-and-comment procedures before issuing the May 30 rule.

The second reason that this Court should review the decision below is that it has far-reaching, adverse consequences for public participation in the administrative process. As the Court has recognized, administrative law decisions of the District of Columbia Circuit "serve as

precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." [10] Allowing the decision below to stand therefore will sanction and encourage, in disregard of the procedural rights of the public, agency use of "interpretative rules" in conjunction with an unacceptably deferential standard of judicial review.

I. THE COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT AUTHORIZES A COMBINED ADMINISTRATIVE AND JUDICIAL REVIEW PROCEDURE THAT VIOLATES THE REQUIREMENTS OF DUE PROCESS OF LAW.

Whether labeled an "interpretative" or "legislative" rule, EPA's May 30 rule imposed onerous new requirements on all vehicle manufacturers subject to the recall provision of the Clean Air Act. Because of the procedures followed by the agency and uncritically embraced by the court below, these manufacturers had no meaningful opportunity to present their views regarding the EPA rule to either the agency or the reviewing court. That fundamental unfairness was aggravated by EPA's declaration that the preclusive review provisions of the Clean Air Act will bar vehicle manufacturers from challenging the rule in any future enforcement proceeding directed at them. The cumulative effect was a denial of the due process of law guaranteed by the Fifth Amendment.

The purpose of the Due Process Clause "is to protect [the] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of pr[illegible]ty." [11] In the rulemaking context, due process requires that affected persons have a reasonable opportunity to present their views to the

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[10] *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 535-37 n.14 (1978).

[11] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *see Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

agency or reviewing court.[12] A meaningful opportunity to be heard can be afforded by allowing affected persons to present comments to the agency before it adopts the rule or, if prior notice and opportunity to comment are not afforded, by making the rule subject to plenary independent judicial scrutiny. Neither opportunity was provided here.

The EPA's invocation of the "interpretative rule" exception to the notice-and-comment requirements of the APA and the Clean Air Act[13] completely excluded the public from agency deliberations. EPA unexpectedly published the rule as a final, binding regulation during its recall dispute with GM and denied MVMA member companies any timely opportunity to persuade the agency that the May 30 rule was unauthorized by statute, impractical, or otherwise deficient. Not only did the agency fail to seek comments before issuing the rule, it did not even request public comment after publication.[14] The

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[12] *See Yakus v. United States*, 321 U.S. 414, 433 (1944) (persons affected by agency action must be given "a reasonable opportunity to be heard" at some point in the administrative process). *See also, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("Parties whose rights are to be affected are entitled to be heard") (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1854)).

[13] The APA exempts interpretative rules from notice-and-comment procedures, 5 U.S.C. § 553(b)(A) (1982), and the Clean Air Act incorporates the exemption, 42 U.S.C. § 7607(d)(1) (1982).

[14] Thus this case differs from those occasions when, to meet an emergency, EPA uses the good cause exception to notice-and-comment rulemaking, 5 U.S.C. § 553(b)(B) (1982), and then solicits comments after issuing the rule. *See, e.g., United States Steel Corp. v. United States Environmental Protection Agency*, 444 U.S. 1035, 1036 (1980) (Rehnquist, J., dissenting from the denial

public was excluded even though the rule had, and was intended to have, a substantial impact on manufacturers' recall obligations and addressed conflicting policy considerations left unresolved by Congress.[15] In so excluding the public, EPA ignored a lesson of its own experience, which is that notice-and-comment rulemaking proceedings frequently result in improved regulations, reflecting the suggestions of affected manufacturers and other interested parties.[16]

The D.C. Circuit compounded the adverse effects of EPA's action by improperly applying the deferential *Chevron* standard of review. Using *Chevron* to review the May 30 rule denied vehicle manufacturers an effective opportunity to challenge in court the substantive or procedural deficiencies of a rule issued without notice or comment. The court below did not seriously test EPA's decision to use the "interpretative rule" exception to notice-and-comment rulemaking and then accepted the substance of the May 30 rule as a not unreasonable method of effectuating public policy goals.

The threatened operation of the preclusive judicial review section of the Clean Air Act exacerbates the unfairness that results from the proceedings below. Section 307(b) provides for exclusive judicial review of "nationally applicable regulations" in the D.C. Circuit within sixty days of publication in the Federal Register.[17] Such

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of certiorari and noting that EPA amended its action in light of subsequent comments).

[15] *See* pages 15-16 *infra*.

[16] Issuing regulations on the useful life of certain engines, EPA recently said that the final rules were "shaped considerably by the public participation during the course of the rulemaking." 49 Fed. Reg. 52170, 52175, 52179 (1983). *See also* 39 Fed. Reg. 44370 (1974) (issuing final recall rules and discussing comments received from the public).

[17] 42 U.S.C. § 7607(b)(1) (1982). The only exception is for a petition "based solely on grounds arising after such sixtieth day." *Id.*

EPA action is not subject to challenge either on procedural [18] or substantive grounds [19] in any later proceeding, specifically including "civil or criminal proceedings for enforcement." [20] The EPA, in promulgating its interpretative rule, specifically invoked this preclusive review section,[21] and the court below accepted the determination.

Review by this Court to reaffirm the protection of the Due Process Clause in this setting is therefore especially urgent. If the May 30 rule is subject to the preclusive review provision, a motor vehicle manufacturer will be unable to argue in a later recall proceeding that the EPA unlawfully failed to use notice-and-comment rulemaking, that it imposed recall obligations on manufacturers not

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[18] *See id.* § 7607(d)(8).

[19] The legislative history of the 1977 amendments to the Clean Air Act makes clear that Congress intended the preclusion to apply to all challenges:

> [T]he committee wishes to reaffirm its intent to strictly limit section 307 challenges to those which are actually filed within that time. The only instance in which the committee intends that later challenges may be entertained by the court of appeals are those in which the grounds arise solely after the 60th day. Thus, unless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1401. This aspect of the judicial review provision discussed in the Report was not altered during the legislative process. *See* H.R. Conference Rep. No. 564, 95th Cong., 1st Sess. 177-78 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1558.

[20] 42 U.S.C. § 7607(b)(2) (1982). *See also id.* § 7607(e) (prohibiting other methods of judicial review of EPA regulations).

[21] It stated: "This rulemaking constitutes a 'nationally applicable regulation' under section 307(b)(1) . . . . Any judicial review of this action is, accordingly, governed by that provision." 45 Fed. Reg. 36396, 36398 (1980).

intended by Congress, or that the reviewing court improperly deferred to the agency action.[22] This Court has previously taken note of the serious due process concerns raised by preclusive judicial review statutes.[23] These constitutional concerns are surely raised by the circumstances of this case—where the rulings of the agency and court below coalesced to deny the affected parties any meaningful opportunity to present their views regarding an "interpretative rule" that vitally affects their interests.

II. THE COURT SHOULD REVIEW THE DECISION BELOW BECAUSE THE LOWER COURT IGNORED THE APA IN APPLYING THE *CHEVRON* STANDARD OF REVIEW TO A RULE THAT IT CHARACTERIZED AS INTERPRETATIVE.

Two separate errors of statutory construction that independently justify review by this Court caused the deprivation of the constitutionally protected procedural rights of the MVMA members and other affected parties. This part of the brief discusses the first: the D.C. Circuit's decision to review the May 30 interpretative rule under the *Chevron* standard. The court below overlooked the context in which the *Chevron* standard was developed, repudiated the longstanding and more rigorous standard of review applicable to interpretative rules, and thereby denied interested parties the rights guaranteed them by the APA. This Court should review the decision below in

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[22] Issues open for litigation would be the applicability of the narrow exception that Congress provided, that is, whether "the basis for [a] challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days," the applicability of the preclusion to interpretative rules, and the constitutionality of the judicial review limitations. *See* note 23 *infra*.

[23] *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 n.9 (1980) (recognizing the "constitutional question" of due process raised by section 307(b) of the Clean Air Act but deferring resolution); *id.* at 594-95 (Powell, J., concurring); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289-91 (1978) (Powell, J., concurring).

order to resolve the conflict that has developed among the lower courts regarding the *Chevron* standard of review and to deny the applicability of *Chevron* to agency interpretative rules.[24]

Because of *Chevron*, the court below accorded great deference to "an administrative construction of a statute that the agency administers," [25] even though that construction was contained in an interpretative rule issued in the absence of prior notice and comment. The D.C. Circuit reasoned that

> reviewing courts should respect the policy choices of administrative agencies. *See Chevron*, . . . 104 S. Ct. at 2793-94. The question presented today is whether the agency's action is a reasonable one in light of the existing statutory constraints, and it is not the job of the courts to propose rules that they would prefer the agency to adopt.[26]

Inhibited by its own job description, the court never reached an independent judgment about a manufacturer's recall liability under the statute; it simply deferred on the ground that EPA's May 30 rule was a reasonable policy choice.

The lower court was incorrect in believing that *Chevron* required such deference to EPA's May 30 rule. *Chevron* was decided in the context of a rule subject to full notice-and-comment procedures and was premised on the fact that the agency had acted only after resolving the differing views on policy presented before the rule was

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[24] GM's petition describes the conflict among the circuits over the application of the *Chevron* standard of review to interpretative rules. *See* General Motors Corporation's Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit 26 (filed January 7, 1985) ("GM Petition").

[25] 742 F.2d at 1566.

[26] *Id.* at 1567 n.8.

adopted.[27] In these circumstances a high degree of deference to the agency entails no denial of due process to affected parties, who have received an opportunity to be heard before the agency. The court below failed to consider whether according such deference to an "interpretative rule" promulgated without any such opportunity was consistent with other decisions of this Court and the requirements of the APA.

In misapplying *Chevron*, the D.C. Circuit disregarded the standard of review for interpretative rules established by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, this Court held that:

> the rulings, interpretations and opinions of the Administrator . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. This Court has repeatedly reaffirmed the *Skidmore* test as the proper standard against which interpretative rules must be measured.[28]

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[27] *See Chevron*, 104 S. Ct. at 2787-90. In *Chemical Manufacturers Ass'n v. NRDC, Inc.*, 53 U.S.L.W. 4193 (U.S. February 27, 1985) (No. 83-1013), the Court applied the *Chevron* standard of review to another EPA regulation. That regulation, like the one in *Chevron*, was issued after full notice-and-comment rulemaking and reconciled competing policy concerns. *Id.* at 4195 n.10 (citing 43 Fed. Reg. 27736 (1978)), 4197-98. As a result, the Court in *CMA* did not address the questions presented in GM's petition.

[28] *See, e.g., FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981) (citing *Skidmore*); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (*Skidmore* is "[t]he most com-

By uncritically substituting *Chevron*'s deference for *Skidmore*'s more rigorous criteria, the court below denied MVMA companies procedural rights protected by the APA. The APA, which embodies Congress' determination of what minimal procedural requirements must be satisfied to protect due process rights,[29] directs reviewing courts to subject interpretative rules to independent and close scrutiny. An interpretative rule is merely the agency's view as to the meaning of the statute it administers, and the APA specifically provides that "the reviewing court shall decide all relevant questions of law." [30]

The legislative history of the APA reflects the understanding that it would be fundamentally unfair for a rule to be promulgated in the absence both of notice and comment and of independent judicial scrutiny. The framers of the APA understood that legislative rules promulgated under congressionally delegated authority could properly be given binding effect because affected persons had an

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prehensive statement of the role of interpretative rulings"). *See also Chevron*, 104 S. Ct. at 2793 n.40 (citing *Skidmore* with approval).

[29] The framers of the APA intended the legislation to protect the purposes that animate the Due Process Clause. They called the APA "a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law." Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. iii (1946). *See also id.* at 217 (APA sets "the minimum requirements of fair administrative procedure"). The courts have also viewed the APA as protecting due process rights. *E.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) ("The rule-making provisions of [the APA] . . . were designed to assure fairness and mature consideration of rules of general application"); *Bell Lines, Inc. v. United States*, 263 F. Supp. 40, 46 (S.D. W.Va. 1967) ("the requirements of the Administrative Procedure Act are fundamental to due process").

[30] Section 10(e) of the APA, 5 U.S.C. § 706 (1982).

opportunity to participate in the agency's rulemaking.[31] Interpretative rules, on the other hand, were exempt from notice-and-comment requirements precisely because "as merely interpretations of statutory provisions . . . [they] are subject to plenary judicial review, whereas 'substantive' rules involve a maximum of administrative discretion." [32]

The courts have consistently implemented the APA's requirements by reviewing interpretative rules under *Skidmore*.[33] Such scrutiny includes not only an independent judgment of the correctness of the agency position but also an examination of "whether the [agency's] action followed the necessary procedural requirements," [34]

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[31] *See* Report of the Committee on Administrative Procedure Appointed by the Attorney General, Administrative Procedures in Government Agencies 101-02 (1941).

[32] Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 18 (1946).

[33] *E.g., CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 120 (1980) (finding CPSC interpretative rule to be "far from authoritative as an expression of congressional will under the oft-quoted factors enunciated in *Skidmore*," and deciding issue of statutory construction for itself); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (same in reviewing EEOC interpretation); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (same in reviewing Bureau of Indian Affairs interpretation); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944) (pre-*Skidmore* case employing similar criteria, and refusing to defer to agency's interpretation of statute in context of general ruling on utility rates). *See also Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (citing *Skidmore* in dictum).

The lower courts have also long recognized that "under *Skidmore* the agency ultimately must depend upon the *persuasive power* of its argument. The simple fact that the agency *has* a position, in and of itself, is of only marginal significance." *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100, 106 (1st Cir. 1984) (substituting own interpretation of statute for agency's). *See also, e.g., Capitano v. Secretary of Health and Human Services*, 732 F.2d 1066, 1076 (2d Cir. 1984) (same).

[34] *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971).

and the courts have not hesitated to invalidate a rule for improperly failing to follow notice-and-comment procedures.[35] Indeed, the court below had itself earlier recognized this duty:

> Even more so than our review of EPA's statutory interpretations, our review of its procedural integrity in promulgating the regulations before us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the [EPA] has not acted unfairly or in disregard of the statutorily prescribed procedures. Our assertion of judicial independence in carrying out the procedural aspect of the review function derives from this country's historic reliance on the courts as the exponents of procedural fairness.[36]

The lower court's failure to follow the APA by applying the *Chevron* standard in place of *Skidmore* seriously prejudiced MVMA member companies. By carrying deference to the point of "total abdication in construing the statute," [37] the court below failed to discharge its essential judicial obligations. It made no effort, of course, to assess the May 30 rule under the *Skidmore* criteria, which would have demonstrated that the rule did not deserve

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[35] *E.g., Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 171 (6th Cir. 1973) (vacating informal rulemaking and remanding for notice-and-comment procedures); *Detroit Edison Co. v. United States Environmental Protection Agency*, 496 F.2d 244, 249 (6th Cir. 1974) (same); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) (same); *Cherry v. Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976) (same).

[36] *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (citation and footnote omitted). The court also required assurances that the agency provide for public "participation commensurate with the complexity and intrusiveness of the resulting regulations." *Id.* at 1028 (footnote omitted).

[37] *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976) (rejecting deference to EEOC interpretative regulations).

the deference it received.[38] Further, the court below made no effort to determine whether EPA was authorized to issue the May 30 rule without prior notice and opportunity to comment. Had the court addressed that question, it would have concluded, as we now show, that EPA had a statutory duty to use notice-and-comment rulemaking before it could lawfully implement the May 30 rule.

III. THE COURT SHOULD REVIEW THE DECISION BELOW BECAUSE THE EPA VIOLATED THE APA AND THE CLEAN AIR ACT IN DENYING MEMBERS OF THE REGULATED INDUSTRY NOTICE OF AND OPPORTUNITY TO COMMENT ON A RULE ENLARGING THEIR RECALL OBLIGATIONS.

By promulgating the May 30 rule as an interpretation without following notice-and-comment procedures, the EPA violated its statutory duty, embodied in both the APA and the Clean Air Act itself, to use such procedures before issuing a rule expanding a manufacturer's recall obligations. Review by the Court therefore is necessary to correct this error and thereby avoid the constitutional issue otherwise raised by the actions of EPA and the court below.

As GM persuasively demonstrates in its petition, the May 30 regulation is a legislative rule, and the EPA violated the APA by issuing it without prior notice and comment.[39] EPA's so-called "interpretative rule" did not merely construe or interpret language in the Clean Air

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[38] The opinions in the court below show that review under *Skidmore* would have produced a different result. Judge Wald for the en banc majority applied *Chevron* and sustained the May 30 rule; Judge Bazelon in dissent applied *Skidmore* standards, 742 F.2d at 1573, and would have vacated the May 30 rule.

[39] *See* GM Petition 15-21. As noted above, the Clean Air Act incorporates the provision of the APA that exempts interpretative rules from notice-and-comment procedures. *See* note 13 *supra*.

Act; it embodied the agency's resolution of conflicting policy objectives.[40] Moreover, these policy choices were necessary because of gaps in the language of the statute that Congress intended the agency to fill pursuant to specific grants of rulemaking authority.[41]

The language and legislative history of the Clean Air Act eliminate any doubt that EPA was required to use notice-and-comment procedures before promulgating the May 30 rule. In 1977 Congress amended the Clean Air Act, specifying detailed procedural steps for EPA to follow before issuing a rule—such as providing notice of proposed rulemaking and opportunity for oral and written public comments [42]—and adding a section to the Clean Air Act that listed "the rules and actions to which such proce-

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[40] *See* 742 F.2d at 1567 n.8 (Wald, J.) (noting that the court "should respect the policy choices" of the EPA); *id.* at 1582 (Bazelon, J., dissenting) (disagreeing with the agency's and GM's interpretations of the statute and suggesting his own interpretation); *General Motors Corp. v. Ruckelshaus*, 724 F.2d 979, 999 (D.C. Cir. 1983) (Wilkey, J., concurring in the original panel decision) (saying four "interpretations of the statute appear to be possible").

Moreover, EPA apparently concedes that its interpretation needs further clarification to resolve open policy questions about the extent of a manufacturer's repair obligation. *See* 724 F.2d at 991-92 (discussing agency explanation that cars beyond their useful life would not need to be repaired to meet the same standards as newer cars).

[41] Section 202(d) requires EPA to prescribe regulations implementing the useful life definition "for purposes of" the recall and remedy provision. 42 U.S.C. § 7521(d) (1982). *See* Conference Rep. No. 1783, 91st Cong., 2d Sess. 49 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 5381 ("Administrator shall prescribe regulations to implement [the useful life] definition"). The recall and remedy provision then incorporates that definition by relating to nonconforming vehicles "when in actual use throughout their useful life (as determined under section 7521(d))." 42 U.S.C. § 7541(c)(1) (1982).

[42] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305, 91 Stat. 685, 772-77 (codified at 42 U.S.C. § 7607(d)(1)-(7) (1982)).

dures will apply." [43] This new section provided that the notice-and-comment procedures would govern the promulgation of rules implementing the provision on useful life [44] and the recall and remedy provision.[45] In explaining the EPA's duties under the new procedural requirements, Congress said: "In promulgating *any* rule referred to in this section," the EPA must respond "to the significant comments, criticisms and data submitted during the comment period" in sufficient depth "to show that the Administrator did consider public comments . . . and to permit any court reviewing the rule under section 307(b) to be fairly apprised of the basis for the Administrator's action." [46]

The intent of Congress in amending the Clean Air Act in 1977 to require legislative rulemaking for rules affect-

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[43] H.R. Rep. No. 294, 95th Cong., 1st Sess. 27 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1105. This House Report provides the most comprehensive explanation for the 1977 amendments. The Senate passed a bill that differed from the House bill but, after a conference, agreed to the House bill with some changes not relevant here. *See* H.R. Conference Rep. No. 564, 95th Cong., 1st Sess. 177-78 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1558.

[44] 42 U.S.C. § 7607(d)(1)(J) (1982) (procedures apply in the "promulgation or revision of regulations under section 7521").

[45] *Id.* § 7607(d)(1)(L) (procedures apply in the "promulgation or revision of any regulations promulgated under section [207] (relating to warranties and *compliance by vehicles in actual use*)" (emphasis added). At the conference between the House and Senate managers, the Senate persuaded the House not to apply the special procedures to EPA review of certain state action required under the Act. H.R. Conference Rep. No. 564, 95th Cong., 1st Sess. 177 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1558. This legislative history demonstrates that Congress specifically considered the sorts of agency action that should be covered by the notice-and-comment procedures and concluded that the procedures were to be used in the recall area.

[46] H.R. Rep. 294, 95th Cong., 1st Sess. 321 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1400 (emphasis added).

ing a manufacturer's recall liability was to prevent just what happened here—a complete exclusion of interested parties from the decisionmaking process. Congress intended "to insure more effective, informed public involvement in decisionmaking under the Act" and to establish "procedural rights and opportunities for public participation in the rulemaking process." [47] The House Interstate and Foreign Commerce Committee, which initiated the bill that later was substantially adopted, had found that EPA's rulemaking procedures were "inadequate" and "needed to be remedied." The Committee stated:

> [A]ppropriately broad administrative discretion to promulgate regulations to protect health or the environment must be restrained by thorough and careful *procedural safeguards that insure an effective opportunity for public participation in the rulemaking process.*[48]

Against this background of congressional intent and action, there is no doubt that the EPA breached its statutory mandate in issuing the May 30 rule without first following notice-and-comment procedures. The rule reflects precisely the kind of agency judgments that should have been informed and enlightened by the full participation of interested parties, and the lower court erred in unduly deferring to the agency's decisionmaking process.

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[47] H.R. Rep. No. 294, 95th Cong., 1st Sess. 2, 27 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1079, 1105.

[48] *Id.* at 319, *reprinted in* 1977 U.S. Code Cong. & Ad. News 1398 (emphasis added).

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the District of Columbia Circuit.

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No. 84-1098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS, Administrator,
United States Environmental Protection Agency,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's brief in opposition serves in many respects to confirm the need for this Court to grant certiorari to review the D.C. Circuit's decision below. Respondent's brief acknowledges a substantial conflict among the lower courts regarding the two major issues of administrative law presented by GM's petition. Moreover, respondent's attempt to apply the law followed in other circuits to the instant facts only demonstrates that this case is an appropriate vehicle for the resolution of these critical issues.

A. Respondent's Arguments Confirm The Need For Review By This Court.

Respondent's brief is most revealing for the points it implicitly concedes or declines to address. First, EPA never disputes the existence of a conflict among the circuits over the test for distinguishing between legislative and interpretative rules. Br. Opp. at 6-7. EPA also accepts GM's contention, and the conclusion of many commentators and lower courts, that the absence of definitive guidance on this issue has created "considerable confusion" in the lower courts. Br. Opp. at 6; Pet. at 10-11 & n.9.

As for the second issue GM's petition presents—the conflict over the applicable standard of judicial review for interpretative rules—EPA's arguments actually magnify the need for granting certiorari. In particular, respondent argues that the D.C. Circuit was correct in applying to a regulation it treated as interpretative the highly deferential standard of judicial review articulated in *Chevron* v. *NRDC*, 104 S. Ct. 2778 (1984). Rather than demonstrate the absence of the conflict among the circuits regarding the applicability of *Chevron*,[1] respondent simply chooses sides

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[1] EPA's attempt to distinguish the First and Second Circuit cases is less than faithful to the decisions of those courts. Br. Opp. at 11 n.5. *Capitano* v. *Secretary of Health & Human Services*, 732 F.2d 1066, 1075-76 (2d Cir. 1984), did directly involve an interpretative rule, and as an indication of the issue's significance, the court specifically explained that *Chevron* did

[Footnote continued]

over how the conflict should be resolved. In so doing, the government indicates it will seek to extend *Chevron*'s mandatory deference standard to interpretative rules nationwide, even though the position respondent advocates conflicts with decisions by the First and Second Circuits.

Finally, respondent tacitly acknowledges that the combination of the D.C. Circuit's interrelated holdings on the legislative-interpretative distinction and the standard of review issues, contravenes the scheme of the Administrative Procedure Act. The congressional rationale for exempting interpretative rules from notice and comment safeguards has been that, "as merely interpretations of statutory provisions . . . [they] are subject to plenary judicial review," receiving only so much deference as their persuasive power warrants. APA Leg. Hist., S. Doc. 248, 79th Cong., 2d Sess. 18 (1946); Pet. at 22-25. But the holdings below, allowing agency regulations addressing legislative policy issues to be classified as interpretative *and then* affording such rules the mandatory level of special deference articulated in *Chevron* produces a truly inequitable exclusion: the public and regulated parties are barred from participating in and informing agency decisionmaking yet are also deprived of an independent determination on judicial review. Such a total exclusion of affected parties violates both fundamental fairness and the purposes of the Administrative Procedure Act.[2] *See also* Reply App. A (letter of Professor Kenneth Culp Davis).

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not "change [the court's] result since we do not have a legislative regulation here." *Id.* at 1076. Presumably the government would not have preferred the use of the *Chevron* standard on rehearing in *Capitano* had the government not felt *Chevron*'s mandatory deference standard would change the result. Similarly, while the context in the second case EPA attempts to distinguish was broader than the review of an interpretative rule, *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, 742 F.2d 1, 11 (1st Cir. 1984), the First Circuit there did unambiguously reject the extension of *Chevron* to the type of issues addressed in interpretative rules.

[2] *See* Brief for the Motor Vehicle Manufacturers Association as *Amicus Curiae* in Support of Petition at 4-9 (April 9, 1985).

B. Under The Tests Applied By Other Courts Of Appeals, EPA's May 30 Regulation Would Be Considered Legislative.

EPA's principal response to GM's first issue is to argue that the May 30 regulation would be considered "interpretative" and upheld even under the alternative tests followed by other circuits. This response is not surprising coming from appellate counsel, but it also does not reflect a fair application of the factors discussed in GM's petition.

In particular, respondent asserts that if congressional intent is the test, the May 30 regulation must be interpretative because the regulation said no more than what Congress expressly intended. Br. Opp. at 6-7. However, the statutory language certainly does not establish the congressional intent respondent asserts. Section 207(c)(1) must be read in conjunction with the 5 year/50,000 mile useful life limitation of § 202(d)(1), and the Court of Appeals opinions identified at least four possible views of the repair obligation under this statutory language. Pet. at 16-18; *see* App. B-43 to B-46 (Wilkey, J., concurring in panel decision). Respondent's assertion is also contradicted by EPA's concession when it promulgated the May 30 regulation that "[t]he legislative history of the Act offers little guidance" regarding the scope of the recall repair remedy. 45 Fed. Reg. at 36397; App. E-5. *See also* Pet. at 16-18 & n.21.

In short, accepting *arguendo* EPA's and the Court of Appeals' characterization, there was no actual congressional intent to guide the choice among the different views of the § 207(c)(1) repair obligation articulated by the parties and the Court of Appeals judges. The very point of the discussion in GM's petition is that regulations adopted to fill such gaps where no congressional intent exists must be legislative, not interpretative. Pet. at 13-14, 17-18; *see* App. B-35 (Bazelon, J., for panel majority).

Respondent contends second that the May 30 regulation would not be legislative under the alternative tests because the only policy determinations reflected in the regulation were already made by Congress. This contention is difficult

to credit given Congress' silence on the issue. In fact, the fundamental policy underlying Congress' 5 year/50,000 mile useful life limitation runs contrary to EPA's regulation. *See* § 202(d)(1); Pet. at 3-4. In any event, the Court of Appeals majority upheld the May 30 regulation on the basis of respect for "the policy choices *of administrative agencies*" and "*EPA* policy." App. A at 8-11 & n.7, 11-12 & n.8, 13, 17, 20-22 (emphasis added). Evidently the court below did not share the view that Congress made the policy choices.

Finally, respondent suggests that the May 30 regulation does not have the "substantial impact" of a legislative regulation, as that factor has been applied by other circuits. But respondent does not dispute GM's estimate that the May 30 regulation would increase *fourfold* the number of vehicles to be repaired in this recall. Pet. at 28; Br. Opp. at 8-9 & n.3. This impact reflects the axiomatic consequence, in this and future recalls, of the agency's decision to override the 5 year/50,000 mile useful life limitation Congress enacted in § 202(d)(1). Thus, this substantial increase in manufacturers' obligations is attributable directly to EPA, and not to Congress.

In sum, GM submits that the conflict over the tests for distinguishing between legislative and interpretative rules is squarely presented by the facts of this case, and that the tests applied in other circuits would have required invalidating EPA's May 30 regulation for failure to allow notice and comment.

C. The Extension Of *Chevron* To Interpretative Rules Is An Issue Only This Court Can Resolve.

Respondent's initial response to the second issue presented—whether the standard of judicial review articulated in *Chevron* v. *NRDC* extends to "interpretative" rules—is to argue that the *Chevron* standard must apply to *all* rules. The consequences of giving *Chevron* such sweeping effect are so far-reaching for the review of agency action,

that GM submits the government's position here is an additional reason to grant the petition for certiorari.

Interpretative rules traditionally have been accorded varying degrees of deference upon judicial review, based on a series of factors explained in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Pet. at 22-23. A court must "substitute" its own independent judgment if the agency's view expressed in an interpretative rule is not persuasive. *Batterton* v. *Francis*, 432 U.S. 416, 425 & n.9 (1977); 2 K. Davis, *Administrative Law Treatise* §§ 7:10, 7:13 (2d ed. 1979). By contrast, legislative regulations have been entitled to a consistently high level of deference, in recognition that agencies are the delegated decisionmakers with respect to legislative regulations. 2 K. Davis, *supra*, § 7:8 ("the law [is] deeply established that the scope of review of interpretative rules is greater than for legislative rules"); *see id.* §§ 7:10, 7:13; Pet. at 10, 22-23. GM does not contend, as respondent suggests, that *Chevron* "established new law" for the review of *legislative* regulations. Br. Opp. at 10.[3] But *Chevron* would represent a dramatic change in administrative law if its mandatory high level of deference extends to *interpretative* rules, as respondent contends and the court below held.

Prior to *Chevron* and the decision below, for example, the D.C. Circuit had distinguished between legislative and interpretative rules in determining the applicable standard of review.[4] At least the First and Second Circuits have adhered to that view and rejected the extension of *Chevron* to interpretative rules. Pet. at 25-26; *see* page 1 & n.1,

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[3] *Chevron*'s standard of review has been invoked or implicated in approximately forty Court of Appeals decisions alone during the past year. Many of those decisions do appear to reflect the view that *Chevron* required an especially deferential standard of judicial review. *See, e.g.*, *Texas* v. *United States*, No. 84-4086 (5th Cir., April 4, 1985); *Washington* v. *EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985); *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 140-41, 150-52 (D.C. Cir. 1984).

[4] *See, e.g.*, *Chrysler Corp.* v. *EPA*, 600 F.2d 904, 916 (D.C. Cir. 1979); *British Caledonian Airways, Ltd.* v. *CAB*, 584 F.2d 982, 995 (D.C. Cir. 1978).

supra. In addition, contrary to the government's position here, the rationale of the Court in *Chevron* does not carry over to the review of interpretative rules. Pet. at 24-25. Moreover, while a majority of the Court did not need to address this question in *CMA* v. *NRDC*, 105 S. Ct. 1102 (Feb. 27, 1985), Justices Marshall, Blackmun, Stevens and O'Connor concluded there that "*Chevron*'s deference requirement . . . was explicitly limited to cases in which congressional intent cannot be discerned." *Id.* at 1121 (dissenting opinion). This understanding would exclude interpretative rules by definition.

Accordingly, GM submits that the D.C. Circuit's decision and respondent's position extending *Chevron* to interpretative rules do represent "new law," which conflicts with the decision of this Court and other circuits, and necessitates plenary review.

D. Contrary To Respondent's Rationalization, EPA's Regulation Was Upheld Based Upon The Improper Application Of *Chevron*'s Highly Deferential Standard Of Review.

Respondent contends secondarily that the D.C. Circuit's extension of *Chevron* may not have affected the outcome of this case. This contention is nothing more than the "*post hoc* rationalizations" of appellate counsel, who is charged with defending agency action and preserving the highest level of deference possible. *MVMA* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2870 (1983).

As respondent appropriately concedes, the majority below upheld EPA's May 30 "interpretative" rule based on *Chevron*'s mandatory and highly deferential standard of review. Nowhere did the majority apply the *Skidmore* factors or the lower level of deference they entail. By comparison, the dissenting judges did apply the *Skidmore* analysis and found that EPA's regulation could not be sustained under *Skidmore* as an interpretative rule. Pet. at 23-24. The importance of the *Chevron* issue to the result here could scarcely be demonstrated more clearly. For just as the Court found in *Chevron*, the degree of deference accorded determined the result on review. *See also Texas* v.

United States, No. 84-4086 (5th Cir., April 4, 1985) (upholding ICC interpretation based on *Chevron* standard "even though—absent such requisite deference to the Commission's construction—this panel may well have decided" otherwise).

E. Respondent's Justification For The May 30 Regulation Further Demonstrates That The Agency Should Have Proceeded By Legislative Rulemaking.

Respondent concludes its brief by defending the merits of the May 30 regulation. This argument bears little response at this point, except to the extent it supports the need for review by this Court.

Respondent's discussion of the merits ironically accuses GM of wanting to rewrite the statute, but it was EPA that took it upon itself to insert the phrase "*regardless of their age or mileage* at the time of repair," which nowhere appears in the statutory text. *Compare* § 207(c)(1) *with* 40 C.F.R. § 85.1803 Appendix A (emphasis added). Similarly, the term "class-based" that respondent uses in explaining a manufacturer's repair obligation can not be found in the § 207(c)(1) description of the vehicles to be remedied.

Respondent's discussion of the policy considerations EPA invoked when the agency hastily adopted the regulation to resolve the dispute during the Cadillac recall, Br. Opp. at 14, moreover, simply emphasizes EPA's initial mistake of ignoring the APA's procedural requirement that regulations predicated on an agency's balancing of significant policy considerations be adopted only through legislative rulemaking. Procedural fairness and reasoned decisionmaking require that when an agency makes a regulation which imposes onerous new requirements, the affected parties should have the opportunity to comment on that rule, its implications and the underlying rationale. *See* Reply App. A (letter of Professor Kenneth Culp Davis).

CONCLUSION

A writ of certiorari should be granted to review the judgment and decision of the Court of Appeals for the D.C. Circuit.

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APPENDIX A

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Dear Mr. Weber:

I have reviewed the petition for certiorari you sent me in No. 84-1098, *General Motors Corp.* v. *Thomas,* the government's brief in opposition, and the Court of Appeals' opinions below. The main idea in the government's brief is easy to answer. The brief rests on the main idea, stated at page 7, that "the May 30 rule did not create any new rights or duties" and that "EPA's May 30 rule did not, and did not purport to involve any significant policy determination not already made by Congress."

The very *facts* of this case—even the facts in the form stated at pages 3 and 4 of the government's brief—rebut that main idea, for the facts clearly show that neither the petitioner nor the EPA knew what the statute required before the May 30 rule was issued. Initially, according to page 3 of the brief, petitioner in 1975 submitted a plan for voluntary recall of 1975 Cadillacs. For two years, EPA and petitioner negotiated, and EPA did not approve the plan. Then in 1979 EPA did at last approve the plan. Thereupon petitioner raised the question about vehicles beyond their five-year/50,000 mile useful lives, and EPA in 1980 issued the May 30 rule, the effect of which was partially to disapprove the plan that EPA had previously approved.

EPA, by fluctuating during the 1975-80 period from approval to disapproval to partial approval of petitioner's plan, clearly demonstrated that the question of what plan should or should not be approved could not be answered by merely looking at the statute.

On the more specific question of whether vehicles beyond their useful life should be included in the plan, the statute was completely silent. *Such vehicles could be either included or excluded without violating the silent statute.* For all that appears, neither Congress nor anyone in Congress had any intent of any kind on the question whether vehicles beyond their useful life must be expensively repaired even if the vehicles have little or no value. For all that appears, no one in the EPA had an answer to that question before the EPA issued its rule on May 30, 1980. Even the specialist agency that had the responsibility fluctuated in trying to answer the question.

When the EPA issued its May 30 rule, it was for the first time creating law on the question of what to do about vehicles beyond their useful life. The May 30 rule was clearly in the nature of *new law.*

The new law embodied in the May 30 rule imposed an onerous requirement, and compliance with the requirement would be very expensive to the petitioner.

A rule imposing such an onerous requirement is precisely the kind of rule for which § 553 of the Administrative Procedure Act requires notice and comment procedure. Yet the EPA issued the rule without using notice and comment procedure.

The fundamental principle of administrative law is that procedural fairness requires that when an agency makes a rule that imposes an onerous new requirement, those on whom the requirement is imposed should ordinarily have opportunity to comment on a proposed rule, in order that the agency may be aware of the impact of the requirement,

and in order that the agency may take into account the reasons against the onerous new requirement.

Although interpretative rules are a necessary administrative tool, and although interpretative rules usually may be properly used without notice and comment procedure, interpretative rules without notice and comment procedure are the wrong tool for imposing an onerous new requirement.

The Supreme Court should adhere to the requirement imposed by § 553 of the Administrative Procedure Act. It should hold that an agency which imposes an onerous new requirement through a rule must use notice and comment procedure. The statute so requires and fairness so requires.

Sincerely yours,

/s/ KENNETH CULP DAVIS

cc: Edward W. Warren, Esq.